

~~ROUGH DRAFT~~

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
WILLIAMSPORT DIVISION

THE PENNSYLVANIA STATE : CASE NO.
UNIVERSITY :
v. :
VINTAGE BRAND, LLC, :
SPORTSWEAR INC., d/b/a :
PREP SPORTSWEAR, :
CHAD HARTVIGSON, ERIK :
HARTVIGSON, and :
MICHELLE YOUNG : 4:21-CV-01091

TRANSCRIPT OF PROCEEDINGS
Jury Trial
VOLUME IV

Held before the HONORABLE MATTHEW W. BRANN, November 15,
2024 commencing at 10:26 a.m., Courtroom No. 1, Federal
Building, Williamsport, Pennsylvania.

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Proceedings recorded by machine shorthand; transcript produced
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1 (Proceedings commenced at 10:26 a.m.)

2 THE COURT: All right. We're back on the record
3 now in the matter of the Pennsylvania State University against
4 Vintage Brand, LLC, et al. docketed in this Court at Civil No.
5 4:21-CV-1091.

6 The jury remains in the jury room so that I can
7 give you some further -- give Counsel further guidance
8 regarding the Defense Motion under Federal Rule of Civil
9 Procedure 50(a)(1) that I ruled on yesterday.

10 I've received some additional papers now from
11 Plaintiff, Penn State. I believe that Vintage Brand wishes to
12 reply, potentially some reply briefing. And so I am going to
13 hold in abeyance my ruling on the -- the Rule 50(a)(1) issue,
14 certainly pending completion of the Defense' case, which we
15 assume will be perhaps late in the day Monday. So that will
16 give Counsel an opportunity to further brief the issue and for
17 me to give some thought to whether I'm going to change my mind
18 on that, on a Motion for reconsideration.

19 So with that said, I think we're ready to begin the
20 Defense case.

21 MR. MCKENNA: We are, Your Honor.

22 THE COURT: Mrs. Rhinehart, do you want to box the
23 jury, please.

24 (At 10:27 a.m., the jury entered the courtroom.)

25 THE COURT: Ladies and gentlemen, I hope you had a

1 restful evening. Counsel and I have spent a little bit of
2 time this morning discussing some ministerial issues.
3 Although we're getting on the record a little later than we
4 hoped, our discussions this morning will speed the plow,
5 so-to-speak with regard to the completion of this case.

6 I believe we're ready to present the Defense case.
7 Defense Counsel, is that right?

8 MR. MCKENNA: That's right, Your Honor.

9 THE COURT: All right. Mr. McKenna, do you want to
10 call your first witness.

11 MR. MCKENNA: Defendants call Dr. David Neal.

12 THE COURT: Dr. Neal, come forward and be sworn,
13 please.

14 (The witness, David Neal, was sworn.)

15 COURTROOM DEPUTY: Can I get you to state your full
16 name and spell your last name for the record.

17 THE WITNESS: Sure. It's David Thomas Neal,
18 N-e-a-l.

19 THE COURT: Go right ahead, sir.

20 DIRECT EXAMINATION ON QUALIFICATIONS

21 BY MR. MCKENNA:

22 Q. Good morning, Dr. Neal. Can you introduce yourself to
23 the jury, please?

24 A. Certainly. My name is David Neal and I'm the managing
25 partner of Catalyst Behavioral Sciences.

1 Q. And, Doctor, what does Catalyst Behavioral Sciences do?

2 A. We are a boutique survey research firm. So I design
3 surveys in a range of different context. Some of them are in
4 lawsuits like this one. But I also do a lot of surveys for
5 companies, essentially market research surveys. I've worked
6 with some of the big brands that you might know, Microsoft
7 Intel, Johnson & Johnson, I do a lot for Procter & Gamble, so
8 brands like Bounty Paper Towel and Tide detergent and
9 Gillette.

10 And in the third bucket of work I do is something
11 that's called epidemiological survey. So those are surveys
12 for sometimes charities or for non-government organizations,
13 folks like the CDC, the Bill and Melinda Gates Foundation.
14 That's where we're using surveys to try to understand the big
15 population health problem.

16 Q. And Dr.Neal, just so we can understand a little bit more
17 about your survey work outside of the context of lawsuits,
18 could you briefly tell us about one of those projects that you
19 were describing?

20 A. Sure. So I just finished a big five-year project for the
21 CDC, and it was focused on the big percentage of the
22 population who's at risk of getting type 2 diabetes. And so
23 it was a survey of those folks in the United States to help
24 try and identify ways to help people make some small changes
25 to their eating and exercise to kind of push down the risk of

1 things progressing to the point where you get type 2 diabetes.

2 Q. Thank you. And, Dr. Neal, what were you asked to do in
3 this case that you'll be talking to us about today?

4 A. I was asked to conduct an independent scientific review
5 of the likelihood of confusion survey that you heard
6 Mr. Franklyn talk through yesterday and to reach my own
7 conclusion about whether the survey was done in a
8 scientifically valid way, and whether he was accurate in
9 reaching the conclusion that he shared yesterday.

10 Q. Okay. And, Dr. Neal, before we get into your review of
11 Mr. Franklyn's survey in depth, could you please briefly walk
12 us through your academic training?

13 A. Sure. So I did my PhD in Australia, as you can probably
14 hear lingering in my accent. I grew up in Australia, but I
15 moved to the US about 20 years ago, became a citizen, did more
16 study at Duke in North Carolina. And there, I was -- I ran an
17 interdisciplinary social science research group, so
18 essentially helping professors run mostly surveys in all sorts
19 of different academic fields. And then following that, I was
20 an assistant professor at USC in California in LA. And then
21 after that, I started my research firm.

22 Q. And, Dr. Neal, have you taught classes at universities
23 relating to consumer psychology or experimental survey design?

24 A. I have. I've taught both of those subjects at Duke and
25 at USC. And that includes to undergraduates and then also to

1 graduate students.

2 Q. And you mentioned survey work in both health behavior and
3 consumer behavior when you were describing your work earlier.
4 Could you tell us about some of the organizations that have
5 funded your survey research on health behavior?

6 A. Sure. So some examples would be the National Science
7 Foundation, the Centers for Disease Control, the World Bank,
8 the Bill and Melinda Gates Foundation, USA ID, and I've also
9 done some work recently for the Surgeon General of the Army on
10 soldier fitness and mental health.

11 Q. And what about your survey research on consumer behavior.
12 What would be some of the funding sources for those -- that
13 work?

14 A. So I mentioned some of the companies earlier, so I might
15 repeat those ones again, but some additional ones more in that
16 kind of apparel and footwear space would be Adidas,
17 Timberland, Vans, the North Face, and there are other consumer
18 brands that I mentioned earlier, like Johnson & Johnson and
19 Procter and Gamble, folks like that.

20 Q. Thank you, Dr. Neal. Have you published articles in
21 peer-reviewed journals or books on topics relating to consumer
22 psychology or experimental survey design?

23 A. I have 26 peer-reviewed publications and maybe two of
24 them I'll quickly mention because they're more relevant or
25 especially relevant.

1 In 2012, I won the outstanding contribution award
2 presented by the Society for Consumer Psychology. And then a
3 couple of years ago, I published a Chapter in the book that
4 folks have been holding up at various times in the trial
5 yesterday. It's the sort of main book that experts who do
6 supervisors in trademark cases rely upon. So I have a Chapter
7 in that book on Psychological considerations in designing
8 trademark surveys.

9 Q. Dr. Neal, that would be this book (indicating)?

10 A. That's the one.

11 Q. Have you acted as a scientific peer reviewer for other
12 people's articles?

13 A. I have. I do a fair amount of peer review analysis,
14 those kind of independent scientific reviews of papers being
15 submitted for publication in an academic journal, and I do
16 that for journals in psychology and in consumer behavior.

17 Q. Dr. Neal, have you previously served as an expert
18 witness?

19 A. I have.

20 Q. About how many times?

21 A. Oh, across what time period?

22 Q. Maybe just in the last few years?

23 A. I'd say something in the order of 15 to 20 times.

24 Q. That you've been an expert.

25 A. Yes.

1 Q. Okay. And how many times have you testified, if you've
2 sort of expanded that out over --

3 A. I think now over 60 times.

4 Q. And what sorts of cases were those?

5 A. Most of them are trademark cases, so very similar to this
6 case here. That's probably 60, 70 percent. And then the
7 remainder would be patent cases, so again, intellectual
8 property law, but a little bit different from trademarks. And
9 then some false advertising cases.

10 Q. And -- and where was that testimony before? What kinds
11 of tribunals?

12 A. Most of it's in federal court, so like where we are here
13 today. Some of it's in the international trade commission,
14 some of it is in front of the US PTO, so it's the Government
15 entity that manages patents and trademarks.

16 Q. And Dr. Neal, has your work as an expert witness involved
17 the design and implementation of surveys to assess likelihood
18 of confusion?

19 A. Yes, it has.

20 Q. About how many of those surveys have you been involved
21 in?

22 A. A rough estimate would be somewhere well over 70.

23 Q. And yesterday, the jury heard Mr. Franklyn talk about the
24 Everready method. Are you familiar with that method?

25 A. I am.

1 Q. Have you used that survey method yourself?

2 A. I have. Again, a rough estimate would be at least 50 or
3 60 times.

4 Q. Dr. Neal, has your testimony regarding a trademark survey
5 ever been excluded by a Court?

6 A. No, it has not.

7 Q. Are you being paid for your work in this case?

8 A. I am. It's my standard hourly rate.

9 Q. And does your pay in this case depend in any way on the
10 outcome?

11 A. No. I'm paid the same amount regardless of what the
12 outcome of the case is.

13 MR. MCKENNA: Your Honor, we tender David Neal as
14 an expert in the field of psychology and the design and
15 implementation of surveys.

16 THE COURT: Do you care to voir dire this witness?

17 MR. FINKELSON: No need, Your Honor. No objection.

18 THE COURT: All right. He's duly admitted for the
19 reasons set forth by Counsel for the Defense. Go right ahead,
20 sir.

21 MR. FETTERS: Thank you, Your Honor.

22 DIRECT EXAMINATION

23 BY MR. FETTERS:

24 Q. Dr. Neal, earlier you mentioned your assignment in the
25 case. But just to get us started, could you remind us of what

1 your goal was?

2 A. Yeah. My goal was to conduct a scientific review of
3 Mr. Franklyn's confusion survey and reach my own conclusions
4 about whether I think the study was done properly and whether
5 his conclusion about likelihood of confusion was -- was a
6 sound one.

7 Q. And how did you approach that goal? What was your
8 methodology?

9 A. Very similar to the same time process you would do in any
10 peer review process. So you start by very carefully reading
11 every question in the questionnaire and looking at the
12 structure of the overall questionnaire, comparing it to the
13 standards in the field, looking at how recruitment of
14 respondents happened, and the second step, you look at the raw
15 data. So basically every person's answer to every question.
16 And you reanalyze it to check all of the conclusions. And
17 then finally, you write up a report with any -- any major
18 problems that you found in the survey.

19 Q. Okay. And, Dr. Neal, could you briefly describe your
20 understanding of the purpose of Mr. Franklyn's confusion
21 survey?

22 A. Sure. Yeah. Why don't we use Mr. Franklyn's own words.
23 I think that we have a slide that has his description.

24 Q. I understand that Plaintiff has no objection. So if we
25 can make sure that it's published to the jury.

1 MR. FINKELSON: Your Honor, we've reviewed the
2 demonstratives and have no objection.

3 THE COURT: No objections. All right. Duly
4 admitted. You may publish.

5 THE WITNESS: So as you can see here, Mr. Franklyn
6 describes his aim for the confusion survey as being retained
7 to assess using standard and generally-accepted statistical
8 and consumer market survey methods the level of confusion
9 between Vintage Brand and Penn State.

10 BY MR. MCKENNA:

11 Q. Okay. And again, just starting at a high level, what was
12 your understanding of the structure of Mr. Franklyn's
13 confusion survey.

14 A. We obviously spent a lot of time going through this
15 yesterday, so I'll just briefly remind us, and we've got a
16 slide here that walks us through the structure, right.

17 So starting at the top, Mr. Franklyn started by
18 recruiting a little over 600 people in the United States who
19 are likely purchasers of college and university apparel. And
20 then he took that 600 people and he broke them up into three
21 groups, so roughly 200 in each of the groups, and he calls
22 those cells.

23 So in test cell one, people saw the imagery that
24 you can see underneath test cell 1, so that gray Nittany Lion
25 t-shirt, plus some text from the website Vintage Brand

1 website.

2 In test cell No. 2, a different 200 saw the S lion
3 design on that blue t-shirt, and again, some additional text
4 next to it from the Vintage Brand website. And then finally,
5 in the control cell, he showed a white Vintage Brand t-shirt,
6 again with different text next to it from the website.

7 Q. And after he had assigned the respondents to these
8 different groups, then what happened?

9 A. So then the final step was to ask a set of questions to,
10 in his view, get at confusion, basically who do you think is
11 the source of this t-shirt, do you think it's sponsored by
12 anyone, affiliated with anyone, or did it receive a licensing
13 from anyone.

14 Q. And, Dr. Neal, how did Mr. Franklyn analyze the data from
15 those responses and what conclusions did he draw?

16 A. So if we move onto the next slide, we can see -- so what
17 Mr. Franklyn did was for each of the people in those three
18 groups, he counted up the number and then he turned it into a
19 percentage, the percentage of people who, in his view,
20 identified Penn State as either the source of the t-shirt or
21 as, you know, getting permission or sponsoring it or licensing
22 it. And as we heard him describe yesterday, he thinks that
23 confusion level was pretty high. He thinks it's 27 percent
24 for one of the t-shirts, the Nittany Lion one, and he thinks
25 it's 39 percent for the blue S lion design. And so that's how

1 he reached his conclusion that there's a significant level of
2 confusion in his mind.

3 Q. Okay. And, Dr. Neal, having reviewed Mr. Franklyn's
4 survey and his data, do you agree with the conclusion he
5 reached?

6 A. I do not. I respect Mr. Franklyn, but for a series of
7 reasons that I'll walk you through in a moment, I think he
8 made some very significant mistakes that led him to those
9 numbers, so I do not agree with him that his survey shows a
10 significant level of confusion.

11 Q. And could you briefly summarize for us why you disagree
12 with Mr. Franklyn?

13 A. Certainly. I think we have a slide that these are my top
14 five concerns. And so I'll kind of walk you through these
15 briefly and then we'll go back and hear about them in a little
16 bit more detail.

17 So the first flaw is that his survey actually
18 doesn't tell us whether the t-shirts themselves are causing
19 confusion because he made a mistake where he changed more than
20 just the t-shirt across his test and his control cells. And
21 that's something we call a scientific confound, and it means
22 that he can't link the confusion back to the t-shirts
23 themselves. So that's problem number one.

24 Problem number two, we heard about this yesterday,
25 was that when he showed people the Vintage Brand website, he

1 cut, from the top where it says Vintage Brand dot com, so he
2 kind of took out a really powerful piece of information that
3 when you are shopping online, tells you where you're buying.
4 I'm buying from Vintage Brand dot com. That was cut out of
5 the stimulus.

6 So I think that really created a lot of ambiguity.
7 People didn't know where they were shopping. And, in turn,
8 that is going to lead people to guess. So that's my second
9 worry about the survey.

10 The third one is that he asked a fourth question
11 about confusion. Typically, in Everready surveys, you might
12 ask two or three questions. He added on an extra question for
13 some reason, I don't really know why he did that. So I -- he
14 kind of went back to the tree to shake the tree to see if he
15 could get some more Penn State answers, and that inflated his
16 confusion level.

17 Flaw number four is that in a survey like this,
18 you're trying to work out who thinks that the Plaintiff, so
19 Penn State, puts out those goods, or is in some way connected
20 with the Vintage Brand's goods. So what you're supposed to do
21 is count up people that say Penn State or something that is
22 obviously a reference to Penn State. But Mr. Franklyn went
23 much broader than that. So he counted people who never said
24 Penn State in response to any question, and just said
25 something like NCAA. So I think he went too broad in what he

1 counted as confusion, and that, again, inflated the confusion
2 level.

3 And then the final one is that he broke a really
4 important rule in Everready surveys, which is that you're not
5 allowed to do something that gets your survey respondents to
6 think about the Plaintiff in an unofficial way. And we'll
7 talk about how he did that. But the technical word is
8 priming. It's kind of laying a little seed in the mind of the
9 survey respondent that gets them to start to think about the
10 Plaintiff, so here, Penn State, in a way that's artificial and
11 is not is happening in the real world. And again, that tends
12 to have the effect of increasing the likelihood that people
13 will start saying Penn State when you ask them questions.

14 Q. Okay. Thank you. And, Dr. Neal, in your mind, are all
15 five of those flaws equally serious?

16 A. No, not really. They're all serious, in my view, but
17 some of them I regard as very serious, so those are the ones I
18 call fatal flaws, if we move onto the next slide. So flaw
19 number one and flaw number two and flaw number five, those are
20 the ones that, in my judgment, are really, really serious.
21 Flaw number three and flaw number four are still problems, but
22 I think are less serious.

23 Q. And, Dr. Neal, what do you mean by a fatal flaw versus a
24 less serious one?

25 A. So a fatal flaw is a flaw that is kind of so serious that

1 it makes the survey data unusable. We're trying to draw a
2 scientific conclusion, and if there's a fatal flaw in a
3 survey, it means we really can't use the survey to answer that
4 question.

5 And he, in my view, has three flaws that feed into
6 that fatal category.

7 Q. Okay. Let's expand a little bit on each of those.

8 Could you start with flaw one, please, and describe
9 in more detail why it matters.

10 A. Sure. So I think it might be helpful to look at the
11 imagery that he put in front of folks. So we looked at this
12 in some detail yesterday. But let's look first and maybe we
13 can zoom into it, at what folks in test cell one saw.

14 Okay. So remember about 200 of the 600 people saw
15 this image. And I want to point out a couple of things about
16 it. It -- as you can see, it includes the Nittany Lion on the
17 gray t-shirt. And that is one of the things that Penn State
18 is really worried about and says is causing confusion and
19 calling it an infringing mark, and this product, in their
20 view, is causing confusion. But that's not the only thing on
21 this page that makes reference to Penn State. If you take a
22 look at the things that we put a red box around, the page
23 makes reference elsewhere to Penn State, as well.

24 So, in fact, it's got it in fairly large bold black
25 lettering over on the right-hand side. It says Penn State

1 Nittany Lions. Right. So why -- that might seem a subtle
2 thing, but it's very important, because what it means is the
3 -- the stimulus, if you put in front of people, it does the
4 right thing in terms of showing people a product with the mark
5 that they're so concerned about, but it does something else
6 that obviously is going to make people think about Penn State.
7 It has the words in black and white, large font to the right.

8 So let's just kind of remember that distinction and
9 then go on and see the next -- the next one.

10 Q. Now, you want to call out --

11 A. Yeah. If we can now look -- now zoom into test cell two.
12 Exactly the same patent is here. He did the right thing in
13 terms of showing people a t-shirt with one of the allegedly
14 infringing marks. This is the S lion. That's okay. But in
15 this case, there's even more references to Penn State outside
16 of the t-shirt itself.

17 So you can see them highlighted over there to the
18 right. So in both of his test cells, he's shown a product
19 that Penn State is worried about, plus he's shown multiple
20 other things on the page. It says Penn State, Penn State,
21 Penn State.

22 Why is that a problem? Let's have a look at the
23 control cell next. So here's his control. And if we can zoom
24 in to that, all right, you'll see here a t-shirt that doesn't
25 have any of the infringing or allegedly confusing marks on it,

1 and that's fine. Plus over on the text to the right, no
2 mentions of Penn State whatsoever.

3 So what does that mean? If we zoom back out to the
4 three images? What does it tells us? It tells us that in
5 both of his test cells, he's got something on the t-shirt
6 itself that is alleged to cause confusion. But he's also got
7 something over here that mentions Penn State. So there's two
8 possible things that when people look at it, they could be
9 thinking Penn State. And in his control, both of those things
10 are gone. So I'll unpack why that's a problem.

11 Q. Okay. Dr. Neal, why would you describe that as such a
12 serious problem?

13 A. Well, in scientific parlons, it's what we call a
14 scientific confound.

15 Q. And could you describe a little bit what does that term
16 mean? Maybe if you could use an example to help explain?

17 A. Sure, so the beauty of an experiment is that everything
18 is kept constant except one thing. All right. And then if an
19 experiment's done really well like that, you can be sure that
20 any differences between the test and the control are caused by
21 that one thing. But what that means is you can only change
22 one thing across your test and your control.

23 Now let's take a look at what is going on here. My
24 understanding is that what Penn State is worried about is the
25 t-shirts and the use of the images on the t-shirts themselves.

1 So that is the thing that they argue is causing
2 people to be confused. So that's the one thing that they
3 needed to isolate. But that's not the survey that
4 Mr. Franklyn actually ran. He created a survey where two
5 things are present in the test, and both of those things are
6 missing in the control. So what it means is that we have no
7 idea what is explaining that difference between the test cells
8 and the control cells. It could be the images on the t-shirt.
9 But it could be the mentions of Penn State to the right of the
10 product. And so perhaps I could, you know, use an example to
11 --

12 Q. I think that might be helpful. Is the thing you're
13 describing, is that limited to surveys that have to do with
14 trademarks?

15 A. No. This is -- which is kind a general scientific
16 principal. So let me may be give a quick example. So let's
17 say someone -- some brilliant person in this room invented a
18 new medication for blood pressure. All right. And a new
19 formula, no one's ever come up with it before. And they
20 wanted to work out, is this actually an effective medication
21 that drop's people blood pressure. All right. So what would
22 you do? You would design a randomized experiment.

23 You take a whole bunch of people who have got high
24 blood pressure, and they're not on my medication today. All
25 right. So you've got 400 of those people. And you'd split

1 them into two groups. 200 of them would get your new drug
2 that you are so confident is going to work. And the other 200
3 would get a placebo, like a sugar pill, something like that.
4 So everyone takes their pill every day and you come back two
5 weeks later, and you look at the blood pressure two of the
6 groups. And if the blood pressure has dropped in the folks
7 who were getting your medication and it hasn't dropped as much
8 in the folks who were getting the placebo, you're proven that
9 your drug causes a drop in blood pressure. So that's a proper
10 design because only one thing varied across the test and the
11 control. The drug that you care about.

12 Mr. Franklyn's survey doesn't work like that.
13 Let's imagine that instead, you made a mistake, and the folks
14 who got your one drug also got put on a second drug for blood
15 pressure. All right. So now what do you have? You've got a
16 test group where people are on two medications, and you've got
17 a control group where people are on zero medications. And now
18 let's say these -- these guys, the folks in the test group,
19 their blood pressure does drop. You've got a difference
20 between your test and your control, but you have no idea which
21 drug caused that change. All right. That is exactly the
22 situation we have here.

23 The images on the t-shirt are drug number one. And
24 all of those references to Penn State to the right, those are
25 drug number two. So Mr. Franklyn did find a difference

1 between his test and his control, but we don't know if it's
2 drug one or drug two that's causing that change. And that's
3 why this is such a big deal.

4 Q. So Dr. Neal, just to be clear, the mentions that you
5 refer to, the descriptions of the products, those are actually
6 -- those are actually on the Vintage Brand website. So are
7 you suggesting Mr. Franklyn shouldn't have shown his test cell
8 participants the images on the website?

9 A. No, no, no. He was right and totally fine for him to use
10 those website images. The mistake he made was he needed a
11 control where those that were drug number two was kind of held
12 constant. He needed a control where those references to Penn
13 State were present in the control, as well. And then he would
14 have been able to compare and say, okay, the t-shirts are
15 adding confusion over and above the mentions of Penn State on
16 the webpage itself.

17 So there was a way he could have fixed this problem
18 and come up with a design where he could really draw a
19 conclusion about the t-shirts themselves, which is what Penn
20 State is worried about.

21 Q. Okay. Dr. Neal, you described this as one of the flaws
22 that you said was fatal.

23 A. That's right.

24 Q. Why is it fatal?

25 A. Well, it's fatal, because my understanding is Penn State

1 is not objecting to -- it's not saying that the confusion is
2 being caused by the descriptions on the website. It wants
3 Vintage Brand to stop selling the t-shirts because it says
4 that the t-shirts are causing confusion.

5 So given that that's what they're concerned about,
6 Mr. Franklyn had to prove that the t-shirts are causing
7 confusion. And as I've explained, his design just doesn't do
8 that. We don't know one way or the other. That's why I call
9 it a fatal flaw.

10 Q. Dr. Neal, were you present in the courtroom yesterday
11 when Mr. Franklyn was testifying?

12 A. I was.

13 Q. And do you remember that I asked Mr. Franklyn if he had
14 any data showing the percentage of consumers who were confused
15 specifically about the images on the front of the Vintage
16 Brand's products?

17 A. I do remember that.

18 Q. Dr. Neal, in your opinion, does Mr. Franklyn have any
19 data that shows the percentage of consumers who are confused
20 by the images printed on Vintage Brand's products?

21 A. He does not because of his confound, because of his
22 problem, he's got a difference -- he can point to a number, 27
23 percent or 39 percent, but he -- he cannot tell us what piece
24 of that number is because of the t-shirt or because of the
25 words Penn State were used next to the product describing it.

1 Q. Okay. Let's move onto flaw two, Dr. Neal. What's the
2 second flaw.

3 A. Okay. So if we move on -- I think we have a slide -- I
4 need to clear this. How do -- thank you. Excellent.

5 Okay. So as you know, when you're shopping online,
6 at the top of the webpage, it will tell you in the browser
7 where you're shopping from. So it will say Amazon dot com or
8 Adidas dot com, wherever you're shopping. That's obviously a
9 very powerful piece of information that tells you what the
10 source of the goods is. All right. It literally tells you
11 where you are buying from. And so if someone went to Vintage
12 Brand website, they would see that information. We can see it
13 on the left-hand side here. It's in pretty small font. I
14 don't know if you can zoom in there.

15 Q. Can you zoom in on the --

16 A. You want to go to the left. Yeah. So this is -- you're
17 familiar to you, I'm sure. This is the URL of a web address
18 where you're shopping. And it says Vintage Brand dot com.

19 Now, Mr. Franklyn's survey, for some reason, that
20 was cropped out of the image. So what does that mean? It
21 means that people just saw, if we can go to the image on the
22 right, it means that people just saw a screenshot, but they
23 had no idea, there was nothing there to tell them this is
24 Vintage Brand dot com. And why is that such a problem? Well,
25 you know, just from common sense, we know that the web address

1 kind of tells you where you're buying from. So if that is
2 being excluded and cut out, what is that going to do? It's
3 going to create a lot of uncertainty because I don't know
4 where this website is. I don't know what the website is.

5 And what happens when people are uncertain in
6 surveys. Well, there's a problem that we sometimes call a
7 reading test. And the reading test is a sort of known problem
8 in surveys, which is that when people are uncertain and you
9 keep asking them questions, eventually they're going to start
10 reading back things that are on the screen. So Penn State is
11 on the screen, they're uncertain, they can't see the web
12 address, it means they're more likely to start guessing things
13 like Penn State.

14 Q. So again, Dr. Neal, these are shown, at least in -- part
15 of this was shown because it was on the website, and you
16 mentioned the URL in the context. Why is it important that
17 the test image match the real world context?

18 A. Well, just -- I mean as a general principal in surveys,
19 any survey is trying to get a measure of something that's
20 happening in the real world. All right. So it's very
21 important that your survey doesn't alter or manipulate or cut
22 out anything that could be really important and is present in
23 the real world.

24 So here, obviously the web address tells you where
25 you're buying from. That would be present in the real world,

1 and it was cut out of Mr. Franklyn's survey, and I think
2 that's obviously a big problem.

3 Q. And in your opinion, what effect would removing the
4 Vintage Brand URL likely have had on the survey results?

5 A. I kind of touched on that. I think the main problem is,
6 you take away the information about where people are shopping,
7 suddenly the uncertainty goes up. They are being asked to
8 answer the question, so they're going to start -- people would
9 be more likely to guess. And they'll start reading things
10 from off the screen, including Penn State. So I think that's
11 the effect that cutting that information out likely would have
12 had on people's answers.

13 Q. And Dr. Neal, you've identified flaw two also as a fatal
14 flaw.

15 A. I did, yes.

16 Q. Why is removing the URL a fatal flaw here?

17 A. Well, just because the whole point of an Everready survey
18 is to work out who do people think is putting out the goods,
19 or is affiliated with it. And if you cut out the web address,
20 that told them who is the source of the goods, that's a big
21 problem. People get that in the real world. They didn't get
22 it in the Franklyn survey.

23 Q. Let's move on to flaw three. Could you describe that
24 flaw for us?

25 A. Sure. Yeah. So what we can see here is little blue

1 boxes. These are the different questions that Mr. Franklyn
2 asked about confusion. And the first three of them are pretty
3 standard, right. So he asked about who do you think puts out
4 these t-shirts and do you think they got sponsorship or
5 approval of anyone, are they affiliated with anyone. That's
6 pretty standard and normal. He added a fourth question about
7 licensing. And I have never seen that before. I think it's
8 unusual for a couple of reasons. It -- I'm not a lawyer, but
9 I know if I was going through this survey and someone asked me
10 do I think this product is sponsored or approved by anyone and
11 then I was asked do I think it's affiliated with anyone, and
12 then I was asked if it was licensed by anyone, I wouldn't
13 really have a clear sense of how those things were different.

14 So I think it's -- this is another example of this
15 survey kind of going back to the tree and trying to shake out
16 as many Penn State answers as it possibly could, using kind of
17 redundant questions.

18 So, you know, the more people -- the more questions
19 you ask, even if -- especially, I should say, especially if
20 they're overlapping and not really different from the question
21 you asked earlier, eventually people will just start guessing.
22 It's kind of a problem with some surveys.

23 Q. And, Dr. Neal, you said you were critical of this, but
24 you don't put this in a category of fatal by itself. Why not?

25 A. Yeah. I don't think this is a fatal flaw. I think it

1 was a mistake. But I -- there are relatively few people --
2 additional people who came up with Penn State because of this
3 extra question. So I think it's a design flaw, but I would
4 not put it in the category of being a fatal flaw.

5 Q. Okay. And could you now describe flaw 4 and tell us why
6 that matters?

7 A. Sure. Yeah. We had some discussion about this
8 yesterday. But the whole point of an Everready survey like
9 this is to basically put in front of survey respondents the
10 Defendant's product, the thing that's alleged to be causing
11 confusion, and then see if they spontaneously think of the
12 Plaintiff, so in this case, Penn State. So what you're
13 supposed to do is look at people's answers and say okay, this
14 person definitely is definitely think of Penn State. This
15 person is definitely thinking of Penn State. This person
16 isn't.

17 Now, Mr. Franklyn used a very unusual coding method
18 where even if a person never said Penn State, at any time to
19 any of his four questions, he still coded them as confused and
20 thinking of Penn State if they wrote NCAA or if they wrote
21 college, or if they wrote university.

22 So he used way too broad criteria to count someone
23 as thinking of the Plaintiff, even if they never mentioned the
24 Plaintiff.

25 Q. So, Dr. Neal, yesterday Mr. Franklyn explained that

1 approach by saying that in the context of this survey, it was
2 reasonable to interpret those answers as referencing Penn
3 State. Do you remember that?

4 A. I do.

5 Q. And does that change your opinion?

6 A. No, because the -- our job as survey experts is to be
7 neutral and not to kind of substitute our opinions for the
8 opinions of the people taking the survey.

9 So let's think about a survey respondent who saw
10 these products and never said Penn State at any point. And
11 then they just wrote NCAA. Mr. Franklyn, with respect -- he
12 doesn't have any basis for saying I know that person was
13 thinking of Penn State, even though they never said Penn
14 State.

15 So the survey expert has to stay hands off with the
16 data. And it's improper for him just to assume that he
17 request get inside the head of the survey respondent and kind
18 of answer for them, and change their answer and NCAA to a
19 reference to Penn State.

20 Q. Okay. And Dr. Neal, flaw 4 is the second one that you
21 said that you regarded as serious but not fatal by itself?

22 A. Yeah. Yeah, that's right. I think it fits this pattern
23 of, you know, repeatedly doing things that kind of inflated
24 the apparent confusion. But again, there weren't that many
25 people who gave an answer like this. So the overall effect on

1 it on the data is relatively small, and so I don't -- I think
2 this is bad, but not fatal to the survey.

3 Q. Okay. Dr. Neal, I think we're up to the final flaw,
4 number five. Could you explain that to us?

5 A. Sure. So I think we have a slide to help here, and
6 again, there was some discussion of this yesterday, right.

7 So let me just start by saying one of the kind of
8 really important golden rules of one of these surveys is that
9 you can't do something early on in a survey that might lay a
10 seed and make people start to think about the Plaintiff before
11 they look at the Defendant's goods, because the whole goal
12 here is to see, when someone looks at one of these t-shirts on
13 the Vintage Brand website, do they spontaneously think of Penn
14 State. Do they think Penn State is the source of that or is
15 affiliated. So you can't do anything early on that -- that
16 lays a seed that might artificially make people start to think
17 about Penn State.

18 And Mr. Franklyn did that. So what we can see here
19 are some questions that he included in his screening part of
20 his survey. So basically, the sort of early survey questions
21 before people even got to the point of seeing the goods at
22 issue, and you can see in question 5-B, he asked within the
23 past 12 months, have you purchased college sports apparel,
24 including any of the following universities. And then he
25 provided a whole bunch of options. And one of the options

1 there was Penn State University. And then he repeated that --
2 he did exactly the same thing a second time, in question 6-B.

3 Q. Okay. Dr. Neal, you mentioned that this is a sort of
4 cardinal rule. Is this the sort of thing that you would see
5 discussed in the scientific literature?

6 A. Yes. It's a -- psychologist survey experts refer to this
7 as the priming problem. So it's kind of -- it's exactly the
8 same as, like, priming a pump to get air out of it or priming
9 -- in the old days, priming the carburetor with gas to get in
10 to the engine. It's the idea of doing something in a survey
11 at the start that kind of nudges or plants a little seed in
12 the mind of the survey respondent that's artificial, and might
13 get them to start to think about Penn State or start to be
14 more likely to offer up Penn State as an answer later on.

15 So this is a kind of a textbook example of doing
16 that.

17 Q. So, Dr. Neal, are you saying that it would never be
18 appropriate to refer to Penn State in an Everready survey?

19 A. Well, it's very rarely done. I can imagine it could be
20 some circumstances where if you were doing it to replicate
21 something that happens in the real world, maybe then it would
22 be okay. But that doesn't apply to Mr. Franklyn's survey
23 here. Right. This -- when people go to the Vintage Brand
24 website, they're not answering questions about whether they
25 bought things from Penn State there's the past 12 months.

1 So he's done something artificial here in his
2 survey that doesn't happen in the real world that planted a
3 little seed in the mind of the survey respondent immediately
4 before, and then looked at Vintage Brand's goods.

5 Q. And, Dr. Neal, as far as you understand from
6 Mr. Franklyn's survey, how did he use the answers to those
7 questions?

8 A. Well, that's another thing that's a bit concerning.
9 These questions had no purpose in his survey. So in his
10 report, he doesn't use them to screen in or out anyone. He
11 doesn't analyze his data in his report based on peoples'
12 answers here. So they didn't really have any purpose. It
13 seems to me -- I don't know the motivation. But it seems to
14 me that the -- at least the effect was to get people to -- get
15 peoples' mental wheels to start turning around Penn State,
16 just before they then looked at Vintage Brand's clothing.

17 Q. And just to be clear, the likely effect of that on
18 responses would have been what, in your judgment?

19 A. Well, any time you make a Plaintiff kind of closer to the
20 surface in peoples' thinking, and then you show them the
21 Defendants' goods, they're going to be much more likely to
22 start answering in ways that refer back to the Plaintiff.
23 It's kind of like -- if I said the word doctor to you, the
24 word nurse is a little bit more accessible in your thinking.

25 Q. Doctor -- Dr. Neal, do you remember yesterday

1 Mr. Franklyn said that he asked those questions because he was
2 wanting to collect some data about whether people were
3 purchasing Penn State products were taking the survey. Do you
4 remember that?

5 A. I do.

6 Q. And does that change your opinion?

7 A. No, it doesn't for a couple of reasons. One is he didn't
8 do that in his report. It might have been his motivation.
9 But if it was, it's a very easy fix, which is just ask these
10 questions at the end of the survey. Don't lay the seed in the
11 mind of the survey respondent just before you're going to show
12 them the Defendants' goods, where this problem can emerge.
13 Just put the question at the end of the survey, then it can't
14 bias anything because there's nothing that's going to come
15 after it.

16 Q. Dr. Neal, just -- you described flaw five as a fatal
17 flaw, as well?

18 A. I did, yes, because this is just such a cardinal rule in
19 Everready surveys that you can't do something that's going to
20 artificially make people think about the Plaintiff, and then
21 ask fair questions about the Defendants' goods and whether
22 they might be put out by the Plaintiff, because you just laid
23 that seed.

24 Q. Okay. Thanks, Dr. Neal. So just to summarize here for
25 the jury. Could you just tell us your overall conclusion

1 regarding Mr. Franklyn's confusion survey?

2 A. Certainly. We can move into the final slide.

3 So I've walked you through five flaws. Three of
4 them, in my view, are really extremely serious, and those are
5 the ones I called fatal. It's my strong opinion that because
6 of these flaws, Mr. Franklyn's survey really simply cannot
7 answer the question that we need to know, which is there a
8 significant likelihood of confusion going on here caused by
9 the goods themselves. So just to briefly recap. The first
10 one is that the survey, because of that confound, the fact
11 that he changed two things in the test and -- and had both of
12 those things missing in the control, he didn't isolate the
13 t-shirts themselves, so he can't draw any conclusions about
14 them. And then we saw that he artificially removed the
15 reference to Vintage Brands from -- Vintage Brand from the
16 website, so removing that really powerful piece of information
17 telling you where you're buying from, and then the final one
18 was priming people, nudging them to think about Penn State in
19 an artificial way right before he showed them the Defendants'
20 goods. Those are my three main worries.

21 Q. Thank you, Dr. Neal. Pass the witness.

22 THE COURT: Thank you. Do you care to
23 cross-examine?

24 MR. FINKELSON: Yes, Your Honor. Do you want me to
25 proceed?

1 THE COURT: Yes. You may do so.

2 CROSS EXAMINATION

3 BY MR. FINKELSON:

4 Q. Good morning, Dr. Neal. Nice to see you.

5 A. You, too. Good morning.

6 Q. The jury didn't hear you say anything, Dr. Neal, about a
7 survey that you conducted in this case, did they?

8 A. That's correct.

9 Q. And that's because you didn't do a survey of your own,
10 right?

11 A. Yes. I was asked to review Dr. Franklyn's survey.

12 Q. And the Defendants and their attorneys in this case, they
13 never asked you to conduct one, correct?

14 A. I believe because one might be being conducted by someone
15 else.

16 Q. And I was actually going to ask you that question. But
17 the fact is, you've conducted many, many trademark confusion
18 surveys in your day, haven't you, sir?

19 A. That's certainly fair. And I've done lots of rebuttals.
20 That's a pretty common practice. Sometimes you get asked to
21 run a survey. Sometimes you get asked to look at someone
22 else's surveys and see if there are problems in it. And so
23 I've done both of those.

24 Q. In this case, you're serving as a rebuttal expert,
25 correct?

1 A. Correct.

2 Q. There have been other cases in which you've served as a
3 rebuttal expert in which you have not only critiqued the other
4 side's expert, but have run a survey of your own, correct,
5 sir?

6 A. Yes. I can't think of one where that side also had
7 another person who was doing a survey like applies here. But
8 you are right.

9 Q. Because the fact is, in this case, the Defendants left
10 the task of conducting a confusion survey, instead, to
11 Dr. Erdem, who, as you know, had only done that kind of survey
12 a few times, right, sir?

13 A. I don't know how many times she's done those surveys.
14 But yes, she was the person doing the survey, and -- for
15 Vintage Brand, and I was the person asked to look at
16 Dr. Franklyn -- I'm sorry -- Mr. Franklyn's survey.

17 Q. Let's talk about Mr. -- Professor Franklyn's survey.

18 Had you been asked to conduct a survey in this
19 matter, Dr. Neal, you agree, don't you, that an Everready
20 would have been the right survey method to use?

21 A. I haven't thought about that, but I think on -- probably,
22 that's likely to be correct, yes.

23 Q. And there's no question, right, that an Everready is a
24 standard, well-established way to test for confusion in a case
25 like this?

1 A. If it's executed correctly, an Everready is a powerful
2 tool, as I explained. Unfortunately, Mr. Franklyn's Everready
3 was not executed correctly.

4 Q. And I didn't ask you about Mr. Franklyn. I'm just asking
5 you about Everready surveys generally, sir.

6 You're familiar, aren't you, Dr. Neal, with the
7 term double-blind as it relates to surveys?

8 A. Yes.

9 Q. And to avoid source or affiliation or bias, had you been
10 asked to do a survey in this case, would you have assured that
11 the survey was double blind?

12 A. Yes. We need to probe the details of how you're thinking
13 about double blind, but as a general rule, surveys in
14 trademark cases should be double blind.

15 Q. In fact, you, yourself, have referred to double blind as
16 the gold standard, haven't you, sir?

17 A. Well, I think I would need to see the context of that,
18 but double blind is an important goal for a survey to meet,
19 yes.

20 Q. You testified in the Barry versus Medtronic case, didn't
21 you, sir?

22 A. Yes.

23 Q. And in the Barry versus Medtronic case, I believe you
24 also mentioned double blind. Would you please explain for us
25 what that means. And your answer was, Sure. So that's kind

1 of a gold standard, you know, in designing a survey. That was
2 your testimony, then, and you agree today, double blind is the
3 gold standard, right, sir?

4 A. It is a gold standard. It's an important thing, yes.

5 Q. And Professor Franklyn's survey was double blind. Yes or
6 no?

7 A. I believe it was, yes.

8 Q. And had you been asked to do a survey in this case, would
9 you have instructed the survey takers not to guess?

10 A. That is a fairly standard instruction to have at some
11 point in the survey. Again, you're kind of asking me very
12 abstract questions outside of the context of a particular
13 survey. But I agree that it's generally good practice to tell
14 people not to guess.

15 Q. And Professor -- I'm sorry. I didn't mean to cut you
16 off, sir. And Professor Franklyn did that too, didn't he?

17 A. Well, unfortunately, he didn't do that for his key source
18 confusion question. He didn't instruct people not to guess
19 there. In fact, he didn't give them an opportunity even not
20 to give an answer. But in other places in the survey, he
21 didn't make that mistake.

22 Q. Let's actually look at what Professor Franklyn did.

23 Mr. Burkhardt, can you please pull up slide 19 from

24 Mr. Franklyn's survey that he shared with the jury yesterday.

25 You were in court yesterday, correct, Dr. Neal?

1 A. I'm sorry?

2 Q. You were here when Professor Franklyn walked the jury
3 through each of the steps in his survey, weren't you, sir?

4 A. I was.

5 Q. And you saw the slide that's on the screen and in front
6 of the jury now, correct?

7 A. I believe so.

8 Q. And you understood Professor Franklyn's testimony that he
9 insisted that all of his survey takers read this question and
10 note whether they understood it or not, and if they didn't
11 understand it, they weren't allowed to proceed, correct, sir?

12 A. I think I recall him saying that.

13 Q. And do you disagree that Professor Franklyn directly
14 instructed his survey takers, quote, Please do not guess. If
15 you don't know for any question, please indicate so?

16 A. He did that, but as I explained a moment ago, in
17 subsequent questions, he denied people the opportunity to not
18 have an opinion or to say that they were guessing.

19 Q. And that -- and you are -- again, you were here, right?
20 The jury wasn't imagining when Mr. Franklyn went through more
21 why questions in his survey with open-ended boxes than -- than
22 I could even keep track of. You were here for that testimony,
23 weren't you, sir?

24 A. Yes. I don't see how it's relevant to this, but I was
25 here for that.

1 Q. You -- had you been asked to conduct a survey in this
2 case, you also would have randomized the answer choices that
3 were presented to survey takers, wouldn't you have?

4 A. Yes. All counter-balance, there are a couple of methods
5 for handling that issue, but as a general rule, unless
6 something is ordered, like age, you would randomize response
7 options.

8 Q. And Professor Franklyn also randomized response options,
9 didn't he?

10 A. Yes. That's why I did not criticize that.

11 Q. And you also agree in it's good practice in a survey this
12 kind to include control steps in the screening process?

13 A. Yes.

14 Q. Would that include such things as a Captcha that that the
15 jury has heard about, which we have all seen to make sure that
16 we're not computer bots?

17 A. Yes. That's right.

18 Q. And Professor Franklyn did that in his survey, didn't he,
19 sir?

20 A. Did he.

21 Q. And would the quality control that you would use, had you
22 -- had you been asked to conduct a survey, would that have
23 also considered a screening question that tests whether the
24 survey taker is paying attention?

25 A. Yes.

1 Q. And you agree that Professor Franklyn did that also,
2 right?

3 A. Yes.

4 Q. And surely, had you been asked to do a survey in this
5 case, which you were not, you would have included images of
6 the allegedly infringing Vintage Brand apparel in your test
7 cells?

8 A. Yes, I would have. Yes.

9 Q. Is it fair to say that you would have asked survey takers
10 a question about who puts out or is the source of the
11 allegedly infringing Vintage Brand apparel?

12 A. Yes. I think I would have asked -- I would have said if
13 they had an opinion and I would have given them an opportunity
14 that they didn't have an opinion, which Mr. Franklyn did not
15 do.

16 Q. And again, sir, you've testified lots of times, right,
17 Dr. Neal?

18 A. A few times, yeah.

19 Q. And you know how this works. I -- this is my one shot to
20 ask you questions and then Mr. McKenna, he gets to stand up
21 and ask you anything I wants, right. Anything he thinks you
22 need to explain, he can do that, right? You understand that?

23 A. Yes.

24 Q. Okay. I'd just appreciate it then, sir, if you'd just
25 answer the questions that I ask. And --

1 A. Yeah.

2 Q. And Mr. McKenna can ask you to elaborate on anything that
3 you think is incomplete.

4 A. Okay. To be fair, sir, sorry. You proposed a specific
5 question and I need to explain that I would not ask the
6 question that way because I think it was an error in it. So I
7 was just trying to clarify that.

8 Q. In the Everready surveys that you've done, Dr. Neal, in
9 your career, do you generally ask a question about who puts
10 out or is the source of the allegedly infringing item, yes or
11 no?

12 A. I don't ask it exactly like that, but I do ask a question
13 like that.

14 Q. Okay. And if you had been asked to conduct the survey in
15 this case, would you also have asked questions about how who
16 the survey takers believe approves the allegedly infringing
17 Vintage Brand apparel?

18 A. Yes.

19 Q. And approval, that's basically synonymous with
20 permission, sir?

21 A. Well that's an empirical question, but often people treat
22 it as if they are synonymous.

23 Q. And, in fact, you, quite frankly, treat permission and
24 approval as synonymous when you're testifying in exercises
25 just like the one we're doing today, don't you, sir?

1 A. I think that's fair, yes.

2 Q. And would you have also asked, correct, if you were
3 conducting this survey, who the survey takers believe the
4 allegedly infringing Vintage Brand apparel was affiliated
5 with?

6 A. Some -- some version of that, yes, I would have.

7 Q. You might have used the word affiliated. You might have
8 used the synonym connected, but one of those two, correct?

9 A. That's fair.

10 Q. Would you then have added up the survey takers who said
11 Penn State in response to questions covering either approval,
12 or affiliation of the allegedly infringing Vintage Brand
13 merchandise to calculate a percentage of gross confusion?

14 A. Yes, I would have.

15 Q. And that's standard practice, isn't it?

16 A. Correct.

17 Q. If one person is confused about source and another person
18 is confused about, say, affiliation, that's two people who you
19 would count as confused, right?

20 A. Correct.

21 Q. Would you then also have used a control image to identify
22 preexisting belief and other noise and subtract the level of
23 that noise from your gross confusion to calculate the amount
24 of net confusion?

25 A. I wouldn't characterize it quite like that.

1 Q. Okay. Where did I go wrong?

2 A. Well the purpose of a control is to isolate whatever the
3 alleged cause of confusion is. So the control should be as
4 close as possible to the test, except for the thing that is
5 alleged to be causing confusion.

6 Q. And have you not, Dr. Neal, referred to what you're
7 trying to identify in the control as being, for example,
8 preexisting beliefs?

9 A. That is one example of what you are controlling for.

10 Q. And another example is what you call noise?

11 A. Yes. That's another example.

12 Q. And another example is just straight up guess, correct?

13 A. Correct.

14 Q. Somebody is looking at a picture of -- you know, the
15 Vintage Brand merchandise and they say, you know -- they're
16 going to say Vintage Brand no matter what. You show them a
17 picture of the Eiffel Tower and they say Vintage Brand.
18 You're trying to identify that situation, right?

19 A. That's fair.

20 Q. And so for that reason, the choice of a control image is
21 absolutely critical in a likelihood of confusion survey,
22 right, Dr. Neal?

23 A. I very much agree with you. Yeah.

24 Q. And you testified to this jury a few moments ago on
25 direct that what Professor Franklyn needed to have was a

1 control where references to Penn State were present in the
2 control, correct?

3 A. That's -- that would be one method to fix the problem in
4 his design.

5 Q. But you know full well, Dr. Neal, that if the allegedly
6 infringing marks are presented to survey takers in both the
7 control condition and the test condition, that defeats the
8 purpose of a control condition all together, doesn't it?

9 A. I don't think you have that right.

10 Q. Okay. Well, let's -- you recall, Dr. Neal, testifying in
11 the AWGI v. Atlas matter?

12 A. Yes, I do.

13 Q. Okay. Can we pull up, Mr. Burkhardt, that testimony for
14 Dr. Neal? I'd request that we publish that, please.

15 THE COURT: Any objection?

16 MR. MCKENNA: I'm reading it. Just give me a
17 minute. Assuming Dr. Neal recognizes it, I have no objection.

18 THE WITNESS: Yes, I do.

19 THE COURT: You may publish.

20 BY MR. FINKELSON:

21 Q. This, what the doctor is looking at here, Dr. Neal, if
22 it's appeared on their screens is testimony that you gave in
23 an expert report, correct, sir, in a case much like this one?

24 A. Correct.

25 Q. Is that right, sir?

1 A. Correct.

2 Q. And the highlighted language where -- starts by you
3 referring to priming, which is a topic that you talked about
4 today, right, Dr. Neal?

5 A. Yes.

6 Q. And you said quote: As a result, the allegedly
7 infringing marks are presented to respondents in both
8 conditions.

9 Do you see that, sir?

10 A. Yes.

11 Q. And by that, you were referring to the test condition or
12 cell and the control cell, right, sir?

13 A. Correct.

14 Q. And you went on to say, and if I'm misreading this, you
15 tell me. If I'm misquoting it. But you went onto say quote.
16 This defeats the purpose of a control condition, which is to
17 remove the allegedly infringing materials, but keep all else
18 constant.

19 Have I read that correctly, sir?

20 A. 100 percent.

21 Q. And that was your testimony under oath in that matter,
22 correct, sir?

23 A. And it's the same testimony here. It's the same point.

24 Q. Have you ever -- have you ever testified, Dr. Neal,
25 before -- let me ask you this. Another thing you said earlier

1 today, when you were referring to Professor Franklyn's control
2 images, you have the three up on -- or test images and control
3 images, you have the three on the screen side-by-side, and I
4 wrote this down. You said it was fine -- that was your word
5 -- it was fine for -- for Professor Franklyn's control not to
6 have any of the infringing marks.

7 Do you remember that testimony?

8 A. Yes.

9 Q. It's more than fine for Professor Franklyn's control not
10 to have any of the infringing marks; it's mandatory?

11 A. I agree.

12 Q. That it -- that it did not have that, correct?

13 A. I agree.

14 Q. Because if the infringing marks are shown to the control
15 group, to go back to your -- your drug analogy, which I really
16 like, by the way, you're not giving your control group a sugar
17 pill at all. You're giving them the drug if they're seeing
18 the infringing marks, right?

19 A. Correct.

20 Q. And that's a no-no?

21 A. We need to zero in on the infringing marks on what.

22 Q. And we're going to do that.

23 A. Okay.

24 Q. We're going to do that. Let me ask you another question.

25 You've never testified before, have you, Dr. Neal,

1 that a control image that you tested is more confusing than a
2 test image that you tested, resulting a finding of negative
3 confusion?

4 A. I think I may have actually found that once. I'm not
5 entirely sure. But I believe that has happened to me in one
6 case.

7 Q. Okay. You testified in another trial like this one.
8 That was the -- I'm not good at these types of -- Ermays case.
9 Do I have that right?

10 A. You do.

11 Q. Okay. Ermays versus Rothchild case. You testified on
12 behalf of Rothchild in that case, didn't you, sir?

13 A. I did.

14 Q. Under oath, did you not state during the trial of that
15 matter, quote: I don't think I have ever run a survey that's
16 found even zero confusion or found zero confusion.

17 A. Yes. That case was several years ago.

18 Q. Okay. So you're not sure whether you've ever found
19 negative confusion or not since then?

20 A. I believe I have -- what I was trying to say is I believe
21 I have found negative confusion in one case, presumably it's
22 since then.

23 Q. We've talked about a couple of cases in which you've been
24 involved, and you've talked earlier today in response to
25 Mr. McKenna's questions about your prior testimony in

1 trademark cases and patent cases and the like. Do you recall
2 that?

3 A. Yes.

4 Q. And do you remember yesterday when Mr. McKenna was asking
5 Professor Franklyn about a different case than this one in
6 which Mr. Franklyn's opinion had been critiqued by a court?

7 A. Yes.

8 Q. Okay. But you know full well, don't you, Dr. Neal, that
9 there's nothing particularly unusual about that?

10 A. I mean it does happen from time to time, yes.

11 Q. Yeah. It happens to the best of them when you testify
12 frequently, doesn't it. And judges and experts sometimes see
13 things differently?

14 A. Occasionally, that's true.

15 Q. And to be fair, it's happened to you too, right?

16 A. On one occasion, yes.

17 Q. One occasion right here in Pennsylvania?

18 A. That's rights.

19 Q. Okay. And it's also true that in the Barry V. Dupue case
20 in which you testified right here in Pennsylvania, the Court
21 excluded your testimony on the grounds that your survey's
22 serious design flaws rendered its results meaningless, and
23 again, unreliable, correct?

24 A. I think that's the same one case that you're talking
25 about. Yes, correct.

1 Q. Let's talk about this issue of -- I'm going to get in to
2 some of the flaws that you've identified.

3 The issue of counting NCAA or the college or the
4 University.

5 A. Right.

6 Q. One of your critiques of Professor Franklyn, as I
7 understand it, is that you -- you don't think he should have
8 counted as confused the folks who said the college or the
9 University or NCAA as opposed to the words Penn State, right?

10 A. Correct. Or something that was obviously Penn State.

11 Q. But you would agree, wouldn't you, Dr. Neal, that this
12 had almost no quantitative impact on Professor -- on
13 Professor's Franklyn's calculation of the amount of confusion?

14 A. It had a very minimal impact, and that's why I described
15 it as a nonfatal flaw and I stated -- I thought it was a bias
16 in a way that he coded things, but didn't have much of an
17 impact.

18 Q. In fact, to be fair, you said something different. What
19 you said was that it was another example of Professor Franklyn
20 inflating the numbers in Penn State's favor. That's what you
21 told the jury no less than 15 minutes ago, right?

22 A. Yes.

23 Q. But, in fact, as you know, had Professor Franklyn not
24 counted the folks who said NCAA or college or university, the
25 bottom end of his percentage range of confusion would have

1 actually gone up. Not down.

2 A. Well I think you're referring to his net number.

3 Q. I am -- I am referring to his net number, sir.

4 A. Yes. I was referring to his gross number. So by having
5 that over inclusive criteria, it is accurate to say he had
6 more people in his test cells who were coded as referring to
7 Penn State who never mentioned Penn State at any point.

8 Q. You understand that with respect to his test cell -- one
9 of his test cells, he testified to the jury yesterday of net
10 confusion of 27 percent. Right?

11 A. Correct.

12 Q. And had Professor Franklyn done the thing that you said
13 he should have done and not looked at any answers that said
14 NCAA or college or university, that number would have actually
15 gone up to 28 percent, right. So it didn't inflate his
16 numbers by doing that. It actually, conservatively, drew them
17 down in Defendant's favor?

18 A. The net number, you are correct. It's still a design
19 flaw. It still shows a pattern of counting in a way that is
20 excessively favorable to Penn State.

21 Q. So your -- your testimony is that by coming in here and
22 telling the jury there was less confusion than he could have
23 told the jury there was, that was Professor Franklyn biasing
24 his testimony in favor of Penn State, sir?

25 A. I'm saying that he -- I'm saying that -- I heard Mr.

1 Franklyn say yesterday that even a respondent who never said
2 Penn State, but said NCAA that Mr. Franklyn could go into the
3 mind of that person and decide that they, in fact, were
4 thinking of Penn State.

5 My criticism of that is that it's wrong for a
6 survey expert to do that. Whether it did have the effect of
7 inflating his grow numbers, you are correct, that his net
8 numbers, it may be -- made them go down by one. And that's
9 why I said it wasn't a fatal flaw.

10 My job is to point out mistakes. And to be fair,
11 and I think I acknowledged this, this is a mistake that didn't
12 have a big impact on the data. And that's how I represented
13 it.

14 Q. And I appreciate that, sir. Let's talk about another one
15 of those.

16 A. Sure.

17 Q. And that's your critique of Professor Franklyn for
18 including a question about licensing, right?

19 A. Yes.

20 Q. Okay. But you know and you heard Professor Franklyn
21 testify to this yesterday, that he did that in response, in
22 part, to a question that the Court had raised in this case,
23 right?

24 A. Right.

25 Q. Okay. And you also know that Professor Franklyn's

1 decision to include people in the numbers that he presented to
2 this jury as confused, based on licensing also had very little
3 quantitative impact on his net confusion results?

4 A. And I think I explained that in my direct. I agree with
5 you.

6 Q. Professor Franklyn didn't double count, right?

7 A. I didn't say he double counted. I said he asked
8 additional questions beyond what's normal.

9 Q. But you agree, he didn't double count, did he?

10 A. Correct. He did not.

11 Q. And if someone -- so that means that if somebody said
12 Penn State, in response to a licensing question, right, but
13 also said yes to one of the questions about source or
14 sponsorship or affiliation, he only counted that person once?

15 A. Correct. I do.

16 Q. And isn't it true that there were only 13 people in
17 Professor Franklyn's whole entire survey who answered Penn
18 State to the licensing question, but didn't answer Penn State
19 in response to any of the questions about source, sponsorship,
20 or affiliation?

21 A. I think that's about right. That's why I described it as
22 not being a fatal flaw.

23 Q. Right. Because if you backed those 13 people out of
24 Professor Franklyn's results, if one were to agree with you
25 that they shouldn't have been in there, the fact is that

1 Professor Franklyn's net confusion survey results still would
2 have shown confusion, gauged by his opinions, right, sir, of
3 more than 1 out of every three?

4 A. That's correct, but of course all of the other flaws
5 still apply. But you are right.

6 Q. And that's why -- I'm trying to be -- I knew you were
7 going to say that. And that's why I said according to his
8 opinion. I know you've got other differences of opinion, but
9 I'm trying to at least -- I think there's a few places where
10 you and I do agree. And I think this is -- this is one of
11 them.

12 Let's please pull up Dr. Neal's slide 6 from the
13 direct examination, please, Mr. Burkhart. Okay. This was
14 your flaw 1 that you discussed with the jury, right?

15 A. Yes.

16 Q. Okay. And in flaw 1, in part, right, you're critiquing
17 Professor Franklyn for including, quote, multiple references
18 to Penn State and Nittany Lion outside the accused product in
19 the test cells, right?

20 A. Correct.

21 Q. And by the accused product, you're basically saying
22 outside the t-shirt itself?

23 A. Yes. That's right.

24 Q. Do you dispute, Dr. Neal, that the images that Professor
25 Franklyn used in his test cells and that are shown on this

1 slide six, minus your red boxes, came straight off Vintage
2 Brand's website?

3 A. Well, with the exception that he cropped off the URL.

4 Q. Well the URL isn't on this page either, is it?

5 A. That's my point. So these -- these were not taken
6 directly off, because he cropped off Vintage Brand.

7 Q. Right?

8 A. But with that exception.

9 Q. The images that you're showing on slide 6 are the images
10 that Professor Franklyn showed to his test cells, right?

11 A. Correct. But I thought your question was whether they
12 were taken from the Vintage Brand website.

13 Q. They were taken from the Vintage Brand website,
14 understanding that you think it -- he should have also taken
15 the URL. And I'm coming to that?

16 A. Gotcha.

17 Q. But other than that point, do you we agree --

18 A. I think we're in agreement.

19 Q. All right. Good deal.

20 You also agree, right, that Professor Franklyn was
21 correct to use screenshots of Defendant's website as stimuli
22 in his survey?

23 A. Yes, I agree.

24 Q. And all of the references in the images that Professor
25 Franklyn used and that are shown here in the red boxes on your

1 slide six, all of those references to Penn State, to be clear,
2 came from Vintage Brand, not from Professor Franklyn, right?

3 A. That's correct.

4 Q. Okay. But it's still your opinion, correct, that it was
5 not okay to include references to Penn State any where in the
6 test cells, other than in the Vintage Brand t-shirts
7 themselves. Do I have that right?

8 A. No. That was not my testimony.

9 Q. You testified that what Penn State was concerned about is
10 the shirt or is concerned about is the shirt. That was your
11 testimony, right?

12 A. Correct.

13 Q. Okay. But you know full well, don't you, Dr. Neal, that
14 Penn State has accused Defendants's t-shirts, sweatshirts,
15 cups, hats, and website of infringing Penn State's trademarks
16 in this case?

17 A. Well, I'm not entirely sure about that. I've read your
18 complaint very clearly. Yes, -- yes, you accused those
19 products. But my understanding is that your position is that
20 Vintage Brand should stop selling these products. You are
21 not, as I understand it, saying keep selling the products but
22 tweak some things on the website.

23 Q. We're not say being, as you read the amended complaint,
24 that -- that there's an issue with Defendants' webpage?

25 A. I don't see any where in your complaint where -- I'm not

1 a lawyer -- but where you say it is the -- the t-shirts or
2 other products may be fine by themselves, but they become
3 infringing in combination with other things going on the
4 website.

5 My understanding is you want Vintage Brands --
6 Vintage Brand to stop selling the accused goods, and that
7 means to show that the accused goods are causing confusion,
8 you needed a survey that isolated the accused goods.

9 Q. Please call up, if you would, please, Mr. Burkhardt, the
10 second amended complaint on page 31, paragraph 91, and we'll
11 see if Dr. Neal is correct about not mentioning the webpage.

12 You recognized -- you've read this complaint. I
13 saw it in your materials you considered, right? You've
14 reviewed that?

15 A. This the second amended complaint?

16 Q. It is, sir.

17 A. I have.

18 Q. And in paragraph 91 of the second amended complaint on my
19 client's behalf specifically said, additionally -- in addition
20 to the t-shirts?

21 A. Correct.

22 Q. Defendants' webpage for Penn State is titled Penn State
23 vicinity's Vintage designs for apparel and gear, in a clear
24 attempt to associate Defendants' goods with Penn State and the
25 goodwill Penn State has built over decades as embodied in the

1 University marks.

2 Have I read that he correctly, sir? Yes or no?

3 A. Yes, you have.

4 Q. Let's talk about the URL because that's where you -- I
5 think you wanted to go next. It comes logically next, right?
6 That was the next flaw on your list of flaws, right?

7 A. Okay.

8 Q. Okay. Can we see Dr. Neal's slide 8, please, Mr.
9 Burkhart. This is your slide that you discussed with the
10 jury, right, Dr. Neal?

11 A. Taken from Mr. Franklyn's survey, at least the image on
12 the right. But yes.

13 Q. Right. The image on the right is one of the pieces of --
14 allegedly infringing merchandise that Professor Franklyn
15 tested in his test cell, correct?

16 A. Correct.

17 Q. And as I understand it, not including the Vintage Brand
18 URL that you show on this slide, often his test images, that
19 is a problem that you see with Professor Franklyn's survey,
20 fair?

21 A. Yes.

22 Q. Okay. And your opinion is that Mr. Franklyn should have
23 -- let me ask it this way. You see, looking at this test
24 image on slide 8, you see the Vintage Brand trademark in bold
25 letters on the page, right?

1 A. In the top left hand corner?

2 Q. Yes.

3 A. Yes.

4 Q. And so it's your opinion that even though Professor
5 Franklyn's test cell image had the Vintage Brand trademark, he
6 should have additionally told test takers that this was the
7 Vintage Brand website, right?

8 A. Absolutely.

9 Q. Okay. Well, do you at least agree with me, Dr. Neal,
10 that Professor Franklyn was consistent in that he didn't
11 include the Vintage Brand URL on his control image either?

12 A. That -- that is correct.

13 Q. And you also agree, don't you, that the test images and
14 the control images should be consistent when it comes to the
15 use or the nonuse of a Vintage Brand URL?

16 A. Well, I don't agree that the nonuse is legitimate. As I
17 explained, it was wrong to occlude, to exclude the reference
18 to Vintage Brand dot com from the test and the control. So --

19 Q. And I understand -- I'm asking you a different question,
20 as I think you appreciate. So I understand that's your
21 opinion. But my question is this. You agree with me, don't
22 you, that the test images and the control image should be
23 consistent with respect to URL?

24 A. Well, I think that's a bit of a trick question. If
25 you're saying should they be consistently wrong? Does that

1 make them better? Is consistently wrong better than
2 inconsistently wrong? I'm not sure. The URL.

3 Q. I'm not sure -- I'm not sure either.

4 A. It's an SAT question.

5 Q. I'm confused.

6 A. The URL should have been there in both of them. And I
7 agree with you that it was missing from both of them.

8 Q. Okay. I think we're -- I think -- I think I understand
9 you.

10 It's your opinion that the URL that exists in the
11 real world should have been present on Professor Franklyn's
12 test cells and on his control cell?

13 A. Correct.

14 Q. Okay. In this slide, you have the caption real world
15 marketplace URL showing. Correct?

16 A. Yes.

17 Q. And then under that, you have you have a red box. And
18 the red box is what you're calling the real world marketplace
19 URL that says Vintage Brand dot com. Right, sir?

20 A. Correct.

21 Q. And it's your testimony to this jury that the URL in the
22 real world for the Vintage Brand -- the Vintage Brand product
23 page that has the t-shirt with the Penn State lion shrine and
24 the Penn State university seal trademark is Vintage Brand dot
25 com?

1 A. Well I think that would depend on which browser you are
2 using, because 134 -- well, at a minimum -- at a minimum, you
3 would say Vintage Brand dot com, which Mr. Franklyn excluded.
4 I'm certainly not an expert on browsers. But my understanding
5 is now some browsers just show you what's called the top level
6 domain. So Vintage Brand dot com. And then some of them will
7 show you the whole thing. So back slash whatever came after
8 it.

9 So depending on what browser someone was on,
10 everyone, as I understand it, would see Vintage Brand dot com.
11 Nobody in Mr. Franklyn's survey saw that. Some people,
12 depending on browser, might also see some additional content.

13 Q. So are you or are you not standing by the testimony that
14 you've give own to this jury, that with respect to Professor
15 Franklyn's test page, the URL would have been Vintage Brand
16 dot com?

17 A. My -- my point was that he excluded the URL.

18 Q. And he excluded it for a reason, Dr. Neal. He excluded
19 it because, as you know -- as you know, the URL didn't just
20 say Vintage Brand. It said Penn State. Exactly the words
21 that you've told this jury he shouldn't have been using the
22 test cell and he can't be using in the control {1E8}, right?

23 A. Well, sir, if that's his explanation for it, why didn't
24 he offer that explanation on the stand.

25 Q. He said yesterday to this jury, Dr. Neal, that the URL

1 string includes the words Penn State and we're going to look
2 at the exhibit right now. Mr. Burkhart, can I please call up
3 just for the benefit of the witness, please, P-318. And for
4 Mr. McKenna, as well.

5 And I would seek to move exhibit P-318 into
6 evidence. There's no objection?

7 MR. MCKENNA: What one is this?

8 MR. FINKELSON: This is our Exhibit P-318. It's a
9 screenshot of the exact website product page that Mr. Franklyn
10 tested.

11 MR. MCKENNA: Okay. No objection.

12 THE COURT: Duly admitted.

13 BY MR. FINKELSON:

14 Q. Dr. Neal, you've spent some time with the test images,
15 right --

16 A. Yes.

17 Q. -- that Professor Franklyn used in his -- in his study?

18 A. Yes.

19 Q. Okay. And you recognize this as -- as the product page
20 for win of the test images that Professor Franklyn tested,
21 don't you, sir?

22 A. I do.

23 Q. Okay. Mr. Burkhart, can you please go to the bottom of
24 the page and note the URL that is part of this screen capture,
25 which the parties have all used in this case. Do you see that

1 highlighted language, Dr. Neal?

2 A. I do.

3 Q. And the URL for this product page that Professor Franklyn
4 tested is not just Vintage Brand dot com, to be to be fair,
5 right? The URL is Vintage Brand dot com back slash L. Back
6 slash college, back slash T. Back slash, most importantly,
7 Penn State, and then lots of other information. Right, sir?

8 A. A couple of points.

9 Q. If you -- if you would --

10 A. It's not a yes or no, first of all.

11 Q. Well, let me ask it as a yes or no question, and then, to
12 be fair to you, my next question is going to be tell the jury
13 your couple of points. Okay?

14 A. Okay. Thank you.

15 Q. So first, yes or no. Was the URL on the product page
16 that Professor Franklyn tested Vintage Brand dot com, back
17 slash, a number of things, including back slash Penn State?

18 A. That was the URL, what people saw that or not depends on
19 what kind of browser you had.

20 Q. Okay. And as I promised.

21 A. Thank you.

22 Q. If you -- is there another point you want to make, or did
23 you get that one out?

24 A. The point is -- so everyone should have been able to know
25 where they were shopping from. So they should have been able

1 to see Vintage Brand dot com. I think it's totally fair what
2 you're saying that some people might have also seen the back
3 slash, yada, yada, yada, Penn State.

4 That, it seems now, you're accepting my point that
5 it was right for Mr. Franklyn to be excluding these other
6 references to Penn State. Because now you seem to be
7 embracing the idea that he cut that off because it was good
8 for him to be excluding these other references to Penn State.
9 So I think you are, finally enough, you are agreeing with the
10 very point you're trying to make, that he shouldn't have had
11 superfluous references to Penn State appearing in his test
12 that he's missing in control.

13 Q. I don't think we're agreeing. But you would agree with
14 me, I think, Dr. Neal, that the URL had the words Penn State
15 in it, and one of the guiding principals in structuring a test
16 like this, is that the word Penn State shouldn't be in the
17 control, and you've testified to this jury that you also
18 believe that the same URL that's shown in the test should be
19 shown in the control, had Professor Franklyn done what you are
20 suggesting, he would have been putting the word Penn State in
21 the URL that was shown to his folks in the control, and I
22 guarantee you, there would have been another box on your
23 slide, frankly, I think, an even bigger box that said that's
24 the biggest fatal flaw of all. That's the biggest fatal flaw
25 of all. And --

1 A. No.

2 Q. And that's correct, sir, isn't it?

3 A. No. I'm very -- I'm very sorry, but you're wrong on two
4 points. The first point is that -- the first point is that I
5 did not agree with you that you couldn't use Penn State in the
6 control outside of the product itself.

7 So that's my whole point, that the references to
8 Penn State outside of the accused product should have been
9 carried over into the control. That's the only way
10 scientifically to work out if the product is causing
11 confusion. So that's the first way that you are wrong.

12 The second way with respect was it would have been
13 fine for him to include Vintage Brand's URL, Vintage Brand
14 URL. He should have done that because that's a pretty
15 powerful coup telling you where the heck you're buying from.
16 And he should have done it in both his test and control. And
17 it would have been totally fine for the URL to include Penn in
18 both. Okay. So that's --

19 Q. To be clear, Penn State.

20 A. Yes. That's right.

21 Q. Okay. So your testimony to this jury is that it would
22 have been totally fine for Professor Franklyn to use the words
23 Penn State, with this jury, who has been with us all week
24 knows it is a Penn State trademark, it would have been totally
25 fine for him to use that in the control. That's your

1 testimony to this jury?

2 A. If the goal -- if the goal was to work out if the
3 t-shirts are causing confusion and he wanted to replicate the
4 marketplace reality, that's exactly what he had to do, because
5 otherwise, he's left with the design he has, where we simply
6 do not know if the confusion numbers he has are being driven
7 by the t-shirts or are being driven by the description of the
8 text on the page.

9 And if it is your goal to say, and I believe it is,
10 the t-shirts are a problem, then he needs to be able to add --
11 he needs to be able to attribute a confusion number to the
12 t-shirts themselves. And with this problem, I can't.

13 Q. I'm sorry. I didn't know you weren't finished.

14 Let's talk about your last critique -- I think it's
15 Dr. Neal's slide 12. The last one is this use of leading
16 questions, right, that primed, and those are the questions
17 that -- can you go to the next line? The one that has the
18 questions that Dr. Neal was talking about with the drop down.
19 Is that before or after that slide? Perfect.

20 So, right. This was the -- these were the
21 questions. Do you want to take a second to grab some water?

22 A. Oh, no. That's fine. Thank you.

23 Q. These were the questions that you were talking about with
24 the jury, I think, as the last one on your list that you went
25 through, right?

1 A. Yes.

2 Q. You have no reason to believe, do you, Dr. Neal, that the
3 survey takers who saw this list of 13 universities would show
4 particular attention to Penn State?

5 A. I mean I presume people are reading what's put in front
6 of them. That would be a quality control issue. And I think
7 Mr. Franklyn would testify that he thought people read what
8 was put in front of them.

9 Q. It wasn't -- that wasn't my question, to be fair. So if
10 you could answer my question, yes or no, do you have any
11 reason to believe that the respondents who saw this list of 13
12 universities would show particular attention to Penn State?

13 A. I presume they read it. But I have no reason to think
14 they gave it more attention than any others.

15 Q. Right. In fact, I think you've already testified in
16 deposition in this case that you would have no reason to think
17 that they would show particular attention to Penn State.

18 A. As I just said, yes.

19 Q. Okay. Nonetheless, your critique, right, is that because
20 survey takers saw Penn State as part of this list during the
21 screening process, by the time they actually took the survey
22 questions, you think they may have been more likely to say
23 Penn State than they would have in the real world. Right?

24 A. Because the seed had been put in their minds for this
25 question, yes.

1 Q. That was the laying the seed testimony that you gave to
2 the jury a few minutes ago, right?

3 A. Correct.

4 Q. But with reference to Professor Franklyn's control, you
5 know, they know, I know, and most importantly people are about
6 to know that that didn't actually happen at all. Right?

7 A. Well, can you clarify what you mean by it happened.

8 Q. What I mean by it happening is that you testified that
9 you thought that these questions were going to make people
10 more likely to say Penn State than they would have in the real
11 world. But the fact is, as you know, in Professor Franklyn's
12 control, nobody, not a single person said Penn State?

13 A. Yes. But there's a very good reason why --

14 Q. And I'll let you explain that in response to
15 Mr. McKenna's questions. But how many people were in
16 Professor Franklyn's control?

17 A. I think roughly 220-ish.

18 Q. 224. So that's -- you have a better memory than I would
19 have had for that issue. You will don't have notes in front
20 of you. 224 people. Zero out of 224 people said Penn State,
21 even though every single one of those control group survey
22 takers were asked the screening questions that included Penn
23 State, that you say surely would have made them think about
24 Penn State. Yes or no?

25 A. Yes. I was referring to the test cell, but yes, you were

1 right. Nobody said it in the control cell.

2 Q. And the number zero, right, sometimes social science and
3 social scientist, there are words that -- the rest of us don't
4 understand, but zero means zero here, just like any time else?

5 A. Right. Correct.

6 Q. And this is another one that you call a fatal flaw,
7 right?

8 A. Yes.

9 Q. Okay. And are you familiar, Dr. Neal, with someone in
10 your field who has written that rebuttal experts are sometimes
11 inclined to declare fatal flaws with a survey with a fervor
12 reminiscent of 17th Century Salem?

13 A. What a beautiful piece of prose. I wonder who wrote
14 that.

15 Q. You know the guy who wrote that. That was you, right?

16 A. Correct.

17 Q. And for that reason, you, yourself, have cautioned that
18 it is really important for a rebuttal expert like you to ask
19 whether the critique actually alters the final conclusion of a
20 survey in a material way. Right?

21 A. Yes. And that's the kind of principal enshrined in my
22 idea of fatal versus not fatal flaws.

23 Q. And so understanding that you critique Professor
24 Franklyn's survey, you understand that Professor Franklyn
25 found net confusion of 27 to 39 percent?

1 A. Yes, using his method, yeah.

2 Q. And now I want to set his survey aside and just talk
3 about likelihood of confusion surveys in general.

4 So you agree, don't you, that net confusion of 27
5 to 39 percent significant any exceeds typically accepted
6 thresholds for establishing a likelihood of confusion?

7 A. I think it's fair to say that if the survey was done
8 properly and those fatal flaws were not there and you found
9 that level of confusion, that would be a sufficient level of
10 confusion.

11 Q. And I know now and everybody in the room knows you don't
12 think Professor Franklyn did it right. You've made that
13 point. You're going to have the opportunity to make it again.
14 Can we just leave that to the side because I just want to talk
15 to you about surveys more generally. So assuming a survey is
16 run in a way that you view is correct, that's what I have in
17 mind when I'm asking these questions.

18 So if a survey that's done right finds net
19 confusion of 27 to 39 percent, you agree, that significantly
20 exceeds typically accepted flesh holds of establishing
21 likelihood of confusion?

22 A. I probably wouldn't use the word significantly exceeds.
23 But I agree with you that if a survey is done right found that
24 level would -- would certainly exceed commonly accepted
25 thresholds.

1 Q. And we'll come back to the word significant -- in a
2 second then.

3 You were here yesterday, weren't you, when
4 Professor Franklyn testified about the 15 percent threshold
5 for appreciable confusion?

6 A. Yes.

7 Q. Okay. And you agree with him on that, don't you?

8 A. I think -- it's not really a survey expert's opinion.
9 It's more of what Courts have accepted being enough versus
10 not, but I certainly agree that courts have looked for numbers
11 around that level.

12 Q. In fact, you've testified, haven't you, Dr. Neal, that 15
13 percent is the magic number for concluding that there's a
14 material amount of confusion?

15 A. Something like that. Yes. The -- based on what Courts
16 have decided. Because I don't think it's really the job of
17 survey expert to come up with that number.

18 Q. But -- but the words magic number, those can be the words
19 of a survey expert to come up with --

20 A. Correct.

21 Q. And you've uttered them, correct?

22 A. Correct.

23 Q. You've even called 15 percent a really material amount of
24 confusion. Haven't you?

25 A. I'll take your word for it.

1 Q. Okay. Do you want me to show it to you?

2 A. I trust you.

3 Q. Okay. You have no reason to dispute that you called 15
4 percent a really material amount of confusion?

5 A. Yeah. I mean I would like to see the context of it, but
6 I -- it it's your point, I'm willing to accept it.

7 Q. And if at least one out of every four people are being
8 confused, you would agree, wouldn't you, that that's a
9 significantly higher percentage than 15 percent magic number?

10 A. Well significantly kind of implies a statistical thing.
11 So I would prefer to avoid phrases like that. But I agree
12 that 25 is larger than 15.

13 Q. Okay. Well, let me ask you this. Wouldn't you agree,
14 Dr. Neal, that net confusion of even 18 percent significantly
15 exceeds typically an accepted thresholds for establishing
16 likelihood of confusion?

17 A. Again, I just -- the term significant -- now you're
18 saying is 18 significantly larger than 15? You're -- I'd
19 rather avoid significantly because it implies statistical
20 thresholds. So 18 is larger than 15.

21 Q. Well today you're -- you're uncomfortable using the word
22 significantly. But you haven't been uncomfortable using the
23 word significantly before, have you?

24 A. I don't know.

25 Q. Okay. Let's look at the D.H. Case, Mr. Burkhart.

1 You're familiar with the D.H. Pace case. You testify he had
2 anesthesia an expert in that case, Dr. Neal?

3 A. Yes.

4 Q. Okay. And this was your testimony in that case in your
5 expert report at paragraph 4. 3. Can you publish that to the
6 jury, please. You recognize this, right, Dr. Neal?

7 A. Yes.

8 Q. Okay. And highlighting the last sentence, you say,
9 quote, Even the lowest net confusion level, that you found in
10 that case, which was 18 percent, quote, significantly exceeds
11 typically acceptable thresholds for establishing a likelihood
12 of confusion, end quote. Correct, sir?

13 A. Yes. And I may have conducted the statistical testing
14 there. So -- that's why I was hesitant to agree, as a general
15 rule, because in this case, I presume -- this was several
16 years ago, but would have conducted that statistical test.

17 Q. But you certainly agree, you've referred to confusion of
18 18 percent as significantly exceeding the 15 percent magic
19 number, right?

20 A. Yes, with that statistical caveat.

21 Q. And you agree with me, because it's just math, right,
22 that 27 percent is more than 15 percent and, in fact, it's a
23 good bit more than 18 percent, which is already significant,
24 right?

25 A. Can't fault the math.

1 Q. And 39 percent, that's more than double 18 percent?

2 A. As I said, if that came from a valid survey, those would
3 be meaningful numbers.

4 Q. Dr. Neal, I appreciate your patience with me. Thanks for
5 answering my questions. And I will pass the witness.

6 A. Pleasure.

7 THE COURT: Thank you, sir. Any redirect?

8 MR. MCKENNA: Yes, Your Honor.

9 THE COURT: Go right ahead.

10 REDIRECT EXAMINATION

11 BY MR. MCKENNA:

12 Q. Dr. Neal, Counsel asked you a question about a case in
13 Pennsylvania where your survey had been criticized?

14 A. Yes.

15 Q. What kind of case was that?

16 A. It was a patent case. And it's currently under appeal.

17 Q. Did it have anything to do with likelihood of confusion
18 or trademarks?

19 A. No.

20 Q. Dr. Neal, is it your understanding, based on your
21 research, that when survey takers are told not to guess, they
22 never guess?

23 A. No. An instruction like that is designed to reduce
24 guessing. It doesn't totally eliminate the problem. And the,
25 of course, you can make other mistakes later on in a survey

1 that kind of get people guessing again. And I identified some
2 of those in Mr. Franklyn's survey.

3 Q. So do survey experts take other steps in designing their
4 survey to minimize guessing, beyond just telling people not to
5 guess?

6 A. They do.

7 Q. So I want to remind you, Counsel asked you a question
8 about a report of yours where you were criticizing someone
9 else for including trademarks in the control.

10 Do you remember that?

11 A. Yes.

12 Q. And I think the point Counsel was trying to make was to
13 say that you agreed with him that it would be a problem to
14 include the Plaintiffs' trademarks in the control.

15 A. Correct, yes.

16 Q. And it sounded like there was something you wanted to
17 explain about what you meant by that criticism?

18 A. Yes. So I was trying to make the point, that the phrase
19 or the paragraph that was put up on the screen is 100 percent
20 consistent with the point that I'm trying to make here, which
21 is the only thing that should be different between the test
22 and the control is the trademark at issue.

23 So here, if that is Penn State is concerned about
24 these shirts bearing these -- what it refers to as infringing
25 marks, the products causing confusion, then that's what needed

1 to be shown in the test, and everything else had to be -- only
2 that could be removed in the control. Everything else held
3 constant. So that the paragraph of text that we put up on the
4 screen and that I think Counsel thought was somehow the
5 opposite of what I was saying here, is actually the exact same
6 point that I'm making here.

7 Q. Okay. Could we bring up the control from Mr. Franklyn's
8 survey.

9 MR. MCKENNA: This is published to the jury?

10 COURTROOM DEPUTY: Yes.

11 MR. MCKENNA: Okay. Thank you.

12 BY MR. MCKENNA:

13 Q. Dr. Neal, in Counsel's examination to you, he was
14 suggesting to you that the URL, right, that had -- that Mr.
15 Franklyn had removed, that he had removed it because, in the
16 test, it would have included back slash information that might
17 have referred to Penn State?

18 A. Correct.

19 Q. Okay. So let me first ask, in your view, would it have
20 been legitimate for Mr. Franklyn to remove the URL just
21 because some people who might have seen it would have also
22 seen back slash information about Penn State?

23 A. No.

24 Q. Why not?

25 A. Because again, the control needs to be identical to the

1 test, except for whatever one thing you're trying to isolate.
2 So he should have shown Vintage Brands, so that the people
3 knew where they were shopping. And then if that involved
4 showing Penn State back slash, that should have been present
5 in the test and the control, and it's effect would have
6 canceled out. So it wouldn't have helped either. It would
7 have canceled out.

8 Q. So actually, Dr. Neal, if we look at the control image
9 here, does that control image have any references to Penn
10 State anywhere?

11 A. No, it does not.

12 Q. If you imagine what the URL would have been in the real
13 world for this page, is that likely to have been Vintage Brand
14 dot com back slash Penn State?

15 A. Unlikely.

16 Q. Why?

17 A. Because this is not making any reference to Penn State.

18 Q. So if the URL's were used in both the test and the
19 control as they appeared in the real world, the control
20 probably wouldn't have had the Penn State references then,
21 would it?

22 A. That's correct.

23 Q. So Mr. Franklyn's defense that he removed it so that it
24 wouldn't be in the control doesn't really have anything to do
25 with the real world, does it?

1 A. No. That's correct.

2 MR. MCKENNA: No further questions.

3 THE COURT: Thank you. Any recross examination
4 based on the redirect examination?

5 MR. FINKELSON: No, Your Honor.

6 THE COURT: Dr. Neal, thank you very much for your
7 testimony. You may stand down with the thanks of the Court.

8 Is there a desire for Counsel to excuse Dr. Neal?

9 MR. MCKENNA: I don't have any more for Dr. Neal,
10 so I would like to excuse him.

11 MR. FINKELSON: I have no objection to excusing
12 Dr. Neal.

13 THE COURT: You're excused, Dr. Neal. Thank you
14 very much.

15 Ladies and gentlemen, I think before we continue
16 any further part of the Defense case, this is an opportune
17 time to take our lunch recess. We'll stand in recess until
18 about 1:15 p.m. I'd ask you to back in the courthouse a few
19 minutes before that. We'll have someone to bring you back.
20 We'll try to begin promptly between 1:00 and 1:30. Escort the
21 jury.

22 (At 12:13 p.m., the jury left the courtroom for
23 their luncheon recess.)

24 (2:05 p.m.)

25 THE COURT: We're back on the record now after an

1 extended luncheon recess. I apologize for the delay. I had
2 an administrative call from some of my colleagues who are
3 hyperventilating about some administrative matter. It wasn't
4 worth my time, unfortunately, but I had to deal with it. All
5 right.

6 I think the Defense ready to call its next witness.

7 MR. FETTERS: Yes, Your Honor.

8 THE COURT: Go right ahead.

9 MR. FETTERS: The Defense calls Chad Hartvigson to
10 the stand.

11 THE COURT: Mr. Hartvigson, come forward to the
12 stand, please.

13 (The witness, Chad Hartvigson, was sworn.)

14 COURTROOM DEPUTY: Can I get you to state your full
15 name and spell your last name for the record.

16 THE WITNESS: Chad Allen Hartvigson, spelled
17 H-a-r-t-v-i-g-s-o-n.

18 THE COURT: Mr. Fetters, go right ahead.

19 MR. FETTERS: Thank you, Your Honor.

20 DIRECT EXAMINATION

21 BY MR. FETTERS:

22 Q. Mr. Hartvigson, let's start by telling the jury a little
23 bit about yourself. Where do you currently live?

24 A. Seattle, Washington

25 Q. How long have you lived in Washington?

1 A. I've lived in Washington most of my life. Outside of
2 eight years, I was playing professional baseball, I spent the
3 rest of my life in Seattle.

4 Q. Are you married?

5 A. Yes, I am.

6 Q. Is your wife, does she work with Sportswear or Vintage
7 Brand in any way?

8 A. No. My wife's a doctor, and she's an anesthesiologist.

9 Q. Any children?

10 A. Yes. I have two little girls.

11 Q. Now, this case is about sports apparel and I understand
12 that this is not the first time that you've been in
13 Williamsport in a sports-related context; is that right?

14 A. That is correct.

15 Q. Can you tell the jury a little bit about that?

16 A. I was here as an 11-year-old baseball player, playing in
17 the Little League World Series. I played on the first team
18 from the United States to upset the Taiwanese in 1982 to win
19 the Little League World Championship. That's still considered
20 today the biggest upset in the 85-year history of the Little
21 League World Series.

22 Q. And I understand that ESPN made a documentary about that;
23 is that right?

24 A. Yes. In 2012, ESPN came out with their first 30 for 30.
25 They previewed 30 of the most interesting sporting events in

1 history. And we were fortunate to be featured as one of the
2 documentary films.

3 Q. So you had some success as a Little League baseball
4 player. Did that success and interest in baseball continue
5 after that?

6 A. Yes, it did.

7 Q. How so? Did you play in high school?

8 A. I did.

9 Q. Okay. And then after high school, did you play baseball
10 in college?

11 A. Yes.

12 Q. Where did you play?

13 A. I received a baseball scholarship to go to the University
14 of Notre Dame where I spent two years playing at the
15 University of Notre Dame.

16 Q. And let me back up. What position did you play at Notre
17 Dame?

18 A. I was pitcher.

19 Q. And then you spent two years at Notre Dame pitching for
20 them. What happened after that?

21 A. I transferred back to Seattle, to the University of
22 Washington where I played baseball there for three years, was
23 the team captain for two years on two Pac-12 championship
24 teams. I was all Pac-12 player and honorable mention All
25 American.

1 Q. Okay. And so after you played baseball -- well, let me
2 ask you this first. Did you graduate from the University of
3 Washington?

4 A. Yes, I did.

5 Q. What did you study and what did you earn your degree in?

6 A. I earned my degree in business economics.

7 Q. After you graduated from the University of Washington,
8 did you continue playing baseball?

9 A. Yes, I did.

10 Q. How so and for whom?

11 A. I played for six years, the San Francisco Giants
12 organization, the Texas Rangers organization, and the Colorado
13 Rockies organization.

14 Q. For folks who are not quite familiar with how major
15 league baseball works, you mentioned some professional
16 baseball teams, big league teams that folks are probably
17 familiar with, but did you have to start out playing in the
18 minor leagues, for example?

19 A. Yes, I did. I started playing in short season A
20 baseball, and I advanced up to triple A, which is the highest
21 level in the minor leagues.

22 Q. And, you know, you're a professional baseball player;
23 you're drafted by these big league teams. Did you ever make
24 it into the big leagues?

25 A. No, I did not.

1 Q. And so was triple A the highest level that you made it
2 to?

3 A. Yes, that's correct.

4 Q. Most people think of major baseball players, the big
5 leaguers, making lots of money, driving Ferraris. Was that
6 your circumstance?

7 A. No. I actually started in short season A. I was making
8 \$850 a month. And I made it up to the top level, which is --
9 you through six levels to get to triple A. And at the very
10 top, I was making \$2,000 a month.

11 Q. Okay. What period of years are we talking about here
12 where you were playing in the minor leagues?

13 A. I was drafted in 1994, and I played through the 1999
14 season.

15 Q. Okay. So what happened in 1999? Did you stop playing
16 baseball at that time?

17 A. I did.

18 Q. And what did you do at that point?

19 A. At that point, I joined my brother in insurance sales,
20 and spent two years selling life insurance with my brother.

21 Q. Okay. Let's talk a little bit about Prep Sportswear,
22 also the formal name, Sportswear, Inc. That's a company that
23 you're involved in?

24 A. Yes.

25 Q. How did you -- is it a company that you started?

1 A. Yes, it is.

2 Q. Okay. Tell the jury a little bit about how you first
3 conceived of Prep Sportswear and how you started to bring that
4 together?

5 A. In 1992, it was my first season at the University of
6 Washington. And I transferred schools from the University of
7 Notre Dame where we had -- were outfitted with a much larger
8 budget than the University of Washington had for baseball.
9 And we had practice uniforms and we had practice gear we wore
10 in the gym and identified us as Notre Dame baseball players.

11 When I transferred to the University of Washington,
12 there was a very little budget for baseball. Most of the
13 money was put in to football and basketball. And so I
14 identified right away, we looked a little silly on the
15 baseball field when everybody had the different colored
16 uniforms and we were all wearing our high school gear.

17 And so I went out and acquired t-shirts and
18 sweatshirts and shorts for all the players on the team that
19 said Washington Baseball. And so we started wearing those in
20 the gym and wearing them around the field. And within a few
21 weeks, the baseball office had a bunch of inquiries from
22 parents and girlfriends and alumni that would like to have a
23 Washington baseball sweatshirt or t-shirt. And that was kind
24 of the start of the idea that there was what I call a small
25 niche market to that -- were under-served, meaning there

1 wasn't product on the market for those markets.

2 And it was particularly associated with high
3 schools. So if you look at your typical high school, it has
4 an average of 36 sports and activities. So that can mean
5 anything from the baseball, softball and soccer teams to the
6 debate, the band, and the music department.

7 So I knew there was these little tiny micro markets
8 within all these schools that nobody was providing gear for.
9 And I thought wow, if you could reach the market and reach the
10 people, there would be a lot of demand for the product.

11 Q. Okay. So you have this idea that sprang from your time
12 in college, and do I take it after you retired from
13 professional baseball, you moved back to Washington?

14 A. That is correct.

15 Q. Okay. So you have this idea. How did you actually go
16 about bringing this idea for this new company to fruition?

17 A. So we get to 2003 and the Internet had started to evolve.
18 You know, being in Seattle and being exposed to seeing Amazon
19 already had grown for about eight years. I had heard a lot
20 about the Internet. I had heard a lot about Amazon and its
21 success selling books and tapes at that point in time on the
22 Internet. I thought that's an interesting concept with the
23 idea that we've had -- that I had had for 11 years was we can
24 probably get to that in consumer that is at the high school
25 whose son or daughter plays on the soccer team.

1 And so we had the idea that if we put a website up
2 and we had -- you know, made available all these products for
3 these high schools, that we could reach the consumer. We
4 thought that might be a pretty good business.

5 Q. Now, I'll ask you a little bit more about the website and
6 the K through 12 schools that would ultimately become part of
7 that website. But who was involved, if anybody, with working
8 with you in these early days?

9 A. So my brother and I, after selling insurance for two
10 years, had decided to start our own investment firm. So we
11 had started that in 2002. And so I went to him in 2003. We
12 were only a year in to starting the investment firm. And said
13 hey, I think the idea that I had in college works if we access
14 the Internet to make this thing happen. And he looked at me
15 and thought I was nuts because we were already starting a
16 business, and it was very difficult.

17 But on the side, I had two 60-year-old parents who
18 had been struggling to find employment. And so the idea was I
19 was going to spend 50 percent of my time at the investment
20 company, and I was going to break off and spend 50 percent of
21 my time setting up this new business, and that my parents,
22 eventually when it was set up, my parents would be able to run
23 it, and we would find some people to help them.

24 So that was the initial start. So it became,
25 basically, a full family business between myself, my brother

1 was doing some paperwork; he managed the checking book. And
2 between the two of us, we funded it, and brought my parents in
3 to help us support it.

4 Q. Now let's go back to the business concept of an online
5 apparel company focusing on fan apparel for K through 12
6 schools. Tell the jury a little bit about, okay, that's the
7 idea. How do you actually -- what does that mean in real
8 practical terms? How would someone actually use that website
9 to make a purchase, for example?

10 A. Right. So the first thing we needed to do is we needed
11 to build a database that had every single school in the
12 country. So at the time, the only database that existed was
13 the federal Government database. And that database had access
14 to everybody. And what it really contains is a lot of
15 demographic information. So it would have the name of the
16 school, the address, and then you would have to go through,
17 break down, you know, gender and how many kids are on free
18 lunch and things like that.

19 So when we accessed that information, we just
20 assumed that it would also let us the mascots of the schools
21 and the colors of the schools. Well, of course, that wasn't
22 there. And so the first real big hurdle that we faced was we
23 were going to have to compile that information ourselves.

24 And so if you go back to 2003, very few schools, K
25 through 12 had operational websites. So we looked at each

1 other and said well, where are we going to get this
2 information, because you really can't build the stores unless
3 you have the mascot names and the school colors.

4 So there's 30,000 high schools in the country. And
5 so we decided we would call every single one of them. And we
6 did. And between myself, my mom, and two assistants, we spent
7 two years, in our spare time, calling all the schools and
8 asking them two questions. What's your mascot; what are your
9 school colors. And we built that database.

10 And so once that database was built, we were able
11 to publish that online and create stores, dynamic stores,
12 meaning you would see images and you could click on them and
13 then we would make that product and send it directly to the
14 consumer.

15 Q. So you've talked about the business concept; you've
16 talked about building the online apparel company where
17 purchases can be made. You talked about the due diligence of
18 calling the schools. How about actually the products
19 themselves. What was the process of getting that going? How
20 did you get the products that you ultimately could sell?

21 A. So, you know, our vision was we are going to do what we
22 call aggravate the front end. So that meant we were going to
23 go out and try to find the market, find the people that really
24 wanted to buy the product and bring them to the website,
25 operate the website, and take the orders. And then we were

1 done. We were going to take those orders and send them to
2 somebody else who already had a printing operation set up that
3 could actually print the items and send them directly to the
4 consumers.

5 So we started down that road, launched the website
6 in the summer of 2003. And we quickly proved that there was a
7 pretty good market for -- demand for those products. So
8 people started visiting the website and started placing
9 orders. And we had set up with a local screen printing shop
10 to actually fill the orders.

11 And so we would print off at my parents' house, at
12 the time the company started in their garage. And we would
13 print off the sheets of paper, and we would take them, drive
14 up to the print shop, it was about 20 minutes away, and give
15 them the pieces of paper to fulfill those orders. And it
16 would take them about three or four days. But we were driving
17 up there every day to give them the new orders and pick up
18 whatever they were completed finishing, and we would actually
19 ship it.

20 And the problem was, and they had told us this when
21 we started, that it's not conceivable to print one single
22 customized piece. So we were paying -- we were charging \$12
23 for every t-shirt we sold on our website, but it was costing
24 us \$36 to have that shirt printed by this outfitted firm.

25 So on one hand, we were, like, all right; we've

1 proved this market. On the other hand, we're, like, don't
2 sell too much stuff because we're losing \$24 on every shirt
3 that we sell.

4 Q. So you described this challenge that you ran into in the
5 existing structure of the apparel industry at that time. What
6 did you do to address that?

7 A. So we did that for about a year. And we had the market
8 proved out. And during that year, I was traveling up and down
9 the west coast trying to find somebody that had the ability to
10 print something at a much lower cost, one single piece. And
11 we couldn't find anybody. Everybody thought we were nuts.
12 The lowest anybody could go was 24 pieces of the exact same
13 item.

14 And so my brother said hey, good learning lesson.
15 Come back to the investment firm. We'll find something else
16 for mom and dad to do. And I said no. I think we can figure
17 this out.

18 So I asked my dad if we could start to use his
19 garage as an R and D facility to try and figure out how can we
20 lower the cost. And where our target was -- we had to get
21 down to \$6 to print individual customized item. And so we
22 went into the garage, and sure enough, it took us 6 months,
23 through trial and error, but we invented a new way to print
24 t-shirts at less than \$6, which allowed us to build the
25 business.

1 Q. What is this new way that you invented?

2 A. So we leveraged some of the existing technology that was
3 in the banner industry. So if you think of a big plastic
4 banner, maybe like a Bud Weiser banner you would see out at a
5 softball field or an advertisement. We used some of the
6 materials that were being used in that industry to cut out
7 graphics and to -- we ended up applying them to cotton and
8 polyester using heat and pressure, which we were told at the
9 time by Hewlett Packard and Epson, they had tried all these
10 things and it didn't work.

11 Well, we figured it out in the garage, and it did
12 work. And that became a whole new industry segment of what
13 grew from that in to what we call today direct to garment
14 printing.

15 Q. So it sounds like in your parents' garage, you had to
16 prove the concept on the manufacturing and printing side.
17 What did you do with that? Did you decide to expand and see
18 where that could go?

19 A. Yeah. So we expanded on that. We added embroidery. We
20 figured out how to auto -- automatically digitize files, so
21 for instance, if you see something that's stitched up here in
22 the left chest, you usually need somebody to go through and
23 code that design on a computer with a software program. And
24 that's labor intensive. So it usually takes somebody an hour
25 or two to do that. And once they do that, then you have the

1 file, and you print a bunch of the items. So if you're doing
2 hundreds of them, it makes sense. But if you're only going to
3 do one single piece, you can't spend that time doing the file.
4 So we built the actual software for ourselves to automatically
5 digitize that file as somebody orders it online. And so it
6 goes directly to the embroidery machine and we can stitch one
7 single piece of item.

8 And so we did that, and around 2006, that expanded
9 the product line. And now we are printable items and
10 embroidery items.

11 Q. And you talked about the early days in your parents'
12 garage. Did you eventually expand to a manufacturing
13 facility, something like that?

14 A. Yeah. So we stayed three years in my parents' garage.
15 Both my parents worked 50-plus hours a week for zero pay. All
16 three of us didn't get paid a single dime for the first three
17 years.

18 It was all a longer term vision, a longer term plan
19 to eventually hopefully create something that was sustainable,
20 and full we did it, we would get paid at the end.

21 And so we started down that road. My mom had no
22 formal education and, you know, she grew up in Virginia, in a
23 trailer park. And my dad did not go to college either. And
24 so, you know, we did some training with them. And we didn't
25 have a lot of automation in the garage. My mom actually

1 handwrote the first 10,000 shipping labels to consumers. She
2 sat there and wrote up address. That's what she did all day
3 long. And my dad would take those orders, and he would drive
4 up to the local post office and stand in line every single
5 day, and have -- pay to ship those directly to the consumers.
6 And they both did that for three years. And they ended up
7 staying with the company for 11 years, until they were little
8 over 70 years old. They worked pretty hard. We've got 5,000
9 employees over 22 years, and I'd say they're probably two of
10 the hardest workers I had ever seen.

11 Q. The manufacturing facility that Sportswear uses at
12 present, is that owned by Sportswear?

13 A. Yes, it is.

14 Q. Where is that located?

15 A. That is located -- as we scaled the facility out, we left
16 the garage after three years and went to downtown Seattle
17 where we had a 5,000 square foot facility. We stayed in that
18 for two years and outgrew it. And then we moved to another
19 portion of Seattle. And we had an 18,000 square foot
20 facility.

21 And at that point, we got to about 2010, and we
22 realized that we needed a much bigger facility. And the
23 largest manufacturing facility at that time in Seattle was
24 about 25,000 square feet, and that was within about 30 miles
25 of Seattle.

1 And so we realized we also needed a different
2 shipping port. So shipping way up here in the United States
3 and shipping all over the country was about the most -- it was
4 the least cost effective shipping point in the country. Plus,
5 we saw the effect Amazon -- we saw the effect that their
6 vision was going to be able to get stuff to consumers either
7 same day they ordered it or the next day. And so consumer
8 expectations, even though we weren't competing with them, the
9 expectations with consumers was going to be hey, I ordered
10 this; I want it shipped the next day. So we realized we
11 needed to be somewhere more centralized. So what we did is we
12 moved that manufacturing facility to a 91,000 square foot
13 facility in Louisville, Kentucky, and it's been there since
14 2010.

15 Q. How many employees are at that facility in Louisville?

16 A. We do fluctuate anywhere from 100 to 200, depending on
17 the seasonality of the business.

18 Q. Now so far, the examples that you talked about and the
19 offerings from Prep Sportswear, we talked about K through 12
20 schools, designs related to those schools. Did Sportswear
21 eventually expand its product offerings in to college-related
22 designs?

23 A. Yes, we did.

24 Q. Please tell the jury about that.

25 A. So in 2009, we were approached by one of the license

1 agencies in the college market, a licensee resource group
2 known as LRG. And they asked us at the time if we could
3 create an online store for a couple of the smaller colleges
4 that they represented. At that time, there were very few, if
5 any, options for these smaller colleges to have products
6 available and printed for them. So we did that.

7 Q. Okay. How would it work under the licensing agreement?
8 Would they give you a portfolio and designs to print on
9 clothing or some other way?

10 A. Sure. So they gave us an art sheet that basically had
11 their approved marks. And then we would take those marks and
12 put together our own designs, and then we would submit them to
13 them, and they would say yes or no or make this change here.
14 Once they're approved, we would put them up on the website.

15 Q. And under the LRG license, what kind of logos are we
16 talking about? Were these, like, modern logos? Vintage
17 logos? How would you describe those?

18 A. They were modern logos and logos they were currently
19 using at their schools.

20 Q. Just to be clear, was Penn State one of the part of the
21 LRG license that Sportswear had?

22 A. No.

23 Q. So you've heard some of the testimony today about
24 officially licensed labels and such and statements on
25 websites. When Prep Sportswear had this license, did Prep

1 Sportswear include similar types of officially-licensed
2 statements on its websites, on its products?

3 A. Yes, we did. We were required by the licensing agency to
4 put on the pages where those products were shown, that we were
5 officially licensed.

6 And then on the products, as we shipped them out of
7 our facility, we were required to take a sticker and place
8 that -- they call it a hologram on that product -- so that
9 when that product shipped and a consumer receives it, they
10 understand that that's an officially-licensed product.

11 Q. And you heard about the hologram, the officially-licensed
12 holograms and some security features. Do you have personal
13 awareness of whether things like that, security features,
14 holgorams, were those a part of the Prep Sportswear license?

15 A. Yes, they were.

16 Q. Can you tell the jury a little bit more about what was
17 entailed when using those holograms?

18 A. Yeah. So the holograms are very closely protected. You
19 purchase those directly from the licensing agency. And they
20 come with a tracking number on them. So we would get those.
21 They would track them. And it was -- they were on top of it,
22 because we would start to run out in the facility and if
23 somebody didn't notice we were running out of those stickers,
24 they would call us and say hey, you're about to ready to run
25 out of stickers in 30 days; you need to order more. And so we

1 would order more, and we would affix them to every single
2 product that we sold.

3 Q. Did you view it as a benefit to Prep Sportswear to be
4 able to market officially-licensed college gear and to sell
5 officially-licensed college gear?

6 A. Sure. It was, you know, telling people that, hey, this
7 is officially-licensed gear, and if you wanted to buy
8 officially-licensed gear, here it is.

9 Q. Okay. So if I understand the progression correctly, from
10 2003 until 2009, Prep Sportswear focus was on K through 12; is
11 that right?

12 A. That is correct.

13 Q. And then from 2009 moving forward, was K through 12 plus
14 some officially-licensed logo gear?

15 A. Yes.

16 Q. Okay. Tell the jury about how things progressed with the
17 licensed gear. Did that remain static; did things change over
18 time with that license?

19 A. Sure. So once we started doing that, it began to grow.
20 LRG grew significantly. I think when they first came to us,
21 you know, they maybe had a hundred colleges. That grew
22 significantly. There was another licensing agency that was in
23 a similar size to them called Strategic Marketing Affiliates.
24 They went by SMA. We signed an agreement with them to take on
25 their colleges, as well. So those were kind of two competing

1 firms.

2 And then about a year later, that puts us around
3 2011, we signed a licensing agreement with the Collegiate
4 Licensing Company, CLC.

5 Q. Okay. And as that license sort of evolved from the
6 mergers and acquisitions you described, did, at any point,
7 Prep Sportswear start offering logos by Penn State?

8 A. No.

9 Q. Okay. So what ended up happening -- well, let me ask you
10 this. When CLC came in to play, did they do anything -- the
11 jury's heard some testimony about certain quality control
12 provisions had been in play for Penn State licensees. So my
13 question is, did Prep Sportswear experience any quality
14 control parameters or requirements under the CLC license?

15 MS. WHEATLEY: Objection. 402, 403.

16 MR. FETTERS: This is relevant to the -- whether
17 the licensees are engaging in quality management of their
18 programs. And so he -- Prep Sportswear, he has direct
19 knowledge of CLC's similar programs, and he can testify to
20 that to his personal knowledge.

21 MS. WHEATLEY: Objection. The witness just
22 testified this did not involve Penn State, so it has no
23 relevance to this case.

24 MR. FETTERS: It's the same licensing agent. The
25 witness for --

1 THE COURT: I would agree with that. I'd note the
2 objection. Overruled. You have may go ahead. Proceed.

3 BY MR. FETTERS:

4 Q. Do you need me to repeat the question?

5 A. I got it. So when we initially applied for a license
6 with CLC, it was a pretty thorough process. And at the end of
7 the process, they asked us for some sample products. And my
8 response was what products would you like. And they said just
9 send us a box full of products.

10 So we picked some products, we printed on the
11 products, and we shipped those directly to Atlanta, to the CLC
12 office. I didn't hear anything back about the products. And
13 so I asked them any -- any additional products. I heard
14 nothing.

15 So we had that license for quite a while. We never
16 were asked again for quality products. In fact, at one point
17 in time in our relationship, I invited portions of their
18 executive team, their vice presidents of apparel, to our
19 manufacturing plant because at the time, we were the only ones
20 doing customized print-on-demand products in the collegiate
21 market. And they said no need to come to your facility.

22 All we wanted to do was we were hoping to expand
23 our relationship with them and showed them some of the
24 capabilities that we had, that we knew were not in the market
25 because it was technology we had developed ourselves. And

1 they never visited the facility, and they never once again
2 asked to see any products from us.

3 Q. Now you touched on your facility having different
4 capabilities and methods to apply designs to apparel. Can you
5 tell the jury a little bit more about that? What are the
6 different methods and whether there are certain advantages and
7 disadvantages of those methods.

8 A. So when we first started in the garage in 2003, you know,
9 we proved out a very -- what now is a very primitive process
10 to print those shirts. Over the course of the last 22 years,
11 we've seen seven migrations of our printing technology in our
12 facility. So it's come a long ways. And most of that is due
13 to the success of that entire print-on-demand industry. The
14 big companies like Epson, Hewlett Packard stepped in and
15 really started innovating around the printing technologies.

16 So today, we use a process called dye sublimation
17 and direct to film. Yesterday, there was some testimony
18 around quality of products in the field. They talked about
19 feeling the products. Most of those products that you are
20 going to see in brick and mortar stores, retail stores are
21 printed with the traditional process of screen printing, which
22 is a process that is very efficient if you're doing a large
23 numbers of items that you're printing. And so that's a
24 process where you put ink across the top of the garment. And
25 I think we're all familiar with how that feels.

1 The new digital printing technologies are entirely
2 different. So you're looking to print a single individual
3 unit, so one unit of a customized shirt. And those processes,
4 particularly the dye sublimation, you print that first out on
5 paper. And then you take that paper, and through heat and
6 pressure, you take the ink, and it absorbs directly into the
7 fabric. So the difference in that is that that is into your
8 fabric, rather than sitting on top of your fabric. And that's
9 going to give you the best finished product and the best --
10 the best hand.

11 Now the products that were shown up here yesterday
12 for Vintage Brand, those were using a different manufacturing
13 process. Those are used what we call direct to film, DTF for
14 short. And that is all new in the last couple of years. And
15 what's unique to that is that's going to bring the efficiency
16 way down. It reduces a lot of the labor involved. It allows
17 you to very closely monitor and manage the brand colors within
18 print.

19 So what you do with that is you print it almost on,
20 like, a wax paper. And then that wax paper, you take, and you
21 can -- with pressure and heat, you can push that onto the
22 garment, and that also sits on top, similar to screen
23 printing. The difference is, in order to get that ink to
24 adhere to that film, there is a layer of what is 95 percent
25 salt water that sits on top of that layer. So when you

1 pressure that onto the shirt, some of that salt water solvent
2 sits on top of that print. When you wash the shirt, that --
3 that comes out. And so the products yesterday, when they were
4 talking about the fabrication feeling plasticity, that's the way
5 it feels. Once you wash it, it comes out, and you have that
6 natural hand. And that product should lasts longer, and you
7 can even dry clean it, compared what you can do with
8 traditional screen printing. We've all screen printing where
9 it starts to kind of fade and fall apart. This will last much
10 longer. This DTF, I believe it's -- I believe that everybody,
11 over the next 10 years, will be using.

12 Q. Now, the CLC license model, did you find over time that
13 that was a perfectly compatible fit with Sportswear's direct
14 consumer online print-on-demand model?

15 A. No. That -- the biggest challenge that we faced with the
16 licensing industry was it began to consolidate quite quickly.

17 MS. WHEATLEY: Objection. MIL 6.

18 MR. FETTERS: We can move on, Your Honor.

19 THE COURT: All right. Objection noted.

20 Sustained. Go ahead.

21 BY MR. FETTERS:

22 Q. Does Sportswear currently sell any products under the CLC
23 license?

24 A. No, we do not.

25 Q. Do you know roughly when Sportswear stopped selling under

1 that license?

2 A. 2020.

3 Q. Does Sportswear currently sell any products with
4 college-related designs under a license?

5 A. Yes.

6 Q. And who, generally, are those licenses with?

7 A. A licensing agency called Affinity Licensing.

8 Q. Okay. And any direct licenses within individual
9 universities?

10 A. Yes.

11 Q. Just roughly, about how many?

12 A. Two dozen.

13 Q. Does Prep Sportswear sell any designs related to colleges
14 that aren't licensed?

15 A. Yes.

16 Q. What's an example of a type of school for that?

17 A. North Seattle College, Tacoma College, Everett College,
18 Edmonds College. Those are all small -- very small colleges
19 that when we first started selling those 15 years ago, roughly
20 around 2009, there was either no supply in the market or
21 nowhere you could buy these. We used very generic text-based
22 designs on those.

23 Q. Now you've been here in the courtroom throughout the
24 trial. You've heard, I believe, some testimony related to
25 Penn State licensees discussing fair labor practices and

1 requirements. Does Prep Sportswear belong or adhere to any
2 fair labor requirements, corporate ethic requirements, things
3 like that?

4 A. Yes. So the Fair Labor Association goes by FLA, we have
5 been a member of FLA since 2012. And FLA really got its start
6 with the Clinton administration, actually, put this in in
7 1999. And what they do is they really look at safety and fair
8 labor wages around the globe. Especially it became important
9 because we were off-shoring a lot of our apparel manufacturing
10 and printing in Southeast Asia.

11 And so we're a member of that. You pay a fee each
12 year, which is a pretty high fee. You do continuing education
13 every quarter. And they actually audit the facilities. So
14 our facility, because of its size, we are able to self-audit,
15 but we send in about a 20-page documentation about the
16 facility to them every single year. And then they have
17 auditing services, people that go out to the facilities
18 through our supply chains. So they're not our facilities, but
19 if we're buying something from a facility that is making,
20 like, a blank t-shirt, they to have an auditor at that
21 facility, and so we're part of that.

22 Q. What kind of financial investment, just generally, has it
23 taken for Prep Sportswear to get its manufacturing facility up
24 and running to it what it is today?

25 A. Yeah. So we have about \$15 million worth of printing

1 equipment in our facility. And we've invested over \$20
2 million into the software technology that drives that
3 facility.

4 Q. All right. Let's switch gears now a little bit and talk
5 about Vintage Brand.

6 When did you first start conceiving of the idea of
7 Vintage Brand?

8 A. That would have been August of 2017.

9 Q. Okay. So tell the jury a little bit about that. What is
10 the idea and what was the -- the issue that you were looking
11 to address in the marketplace?

12 A. So, you know, I've been a life-long sports fan, you know,
13 collected baseball, football, and basketball cards in the 70s,
14 and 80s, and I have quite of the few game programs and things
15 that I have attended that I've kept over time. And we started
16 noticing that vintage apparel and vintage designs were
17 starting to come to the market in 2017. We thought that there
18 would be a pretty good market for some of these sports
19 collectibles.

20 And so we started looking online and come to find
21 out on E-Bay, you know, so many people, sports collectors or
22 people that are just individual collectors at home were
23 selling off a lot of their collectibles. And so we started
24 looking at some of those graphics and thought, wow, those
25 graphics are pretty unique, pretty artistic. I wonder if we

1 could reproduce those images at a very high, what we call
2 resolution, it means a lot of pixels in there, to be able to
3 print them on consumer items, like mugs and t-shirts and hats.
4 And so we tested that, and we were able to make it work to the
5 point where the product was high enough quality that we could
6 reproduce those images. And so we figured, gosh, we may have
7 started a whole entire another market here by leveraging
8 historical images in a new way.

9 Q. Now you used the word we. Who else was involved in
10 considering this new business concept?

11 A. Right. So my second cousin, Erik Hartvigson, who had
12 worked at Prep Sportswear for eight years, and Michelle Young,
13 another person at Prep Sportswear that had been there at that
14 point in time, for 12 years.

15 Q. All right. And you described to the jury that you had
16 your own personal collection of sports memorabilia where you
17 were engaging in the proof of concept. Was that sufficient,
18 in your view, or did you think that you needed to go out and
19 acquire more?

20 A. No. If we were going to take this to market, we
21 obviously had to have quite a few images, things across all
22 different sports, all different years, all different decades,
23 eras. And so we started to collect different sports
24 collectibles.

25 Q. How did go about actually doing that?

1 A. So initially, we started purchasing things on E-Bay. And
2 that became almost like a full-time job doing that, searching
3 for things, trying to find things that were very interesting,
4 trying to find things that we thought would have historical
5 value.

6 And I purchased the first couple thousand items off
7 of E-Bay. And then after that, as I started doing more
8 research, there were quite a few message boards and areas
9 where a lot of these collectors were talking. And a lot of
10 times they were trying to trade each other's collectibles.
11 And it became very common, we learned, that a collector
12 usually focused on one specific thing. And we found a lot --
13 because I'm a former baseball player, I found it very
14 interesting that there were collectors that were trying to
15 collect, for instance, every game ticket where Reggie Jackson,
16 a famous Yankee baseball player had hit a home run. And
17 that's what that guy was doing. He was trying to get all 500
18 home runs Reggie Jackson hit, every game ticket.

19 And so once we saw there were all these
20 individuals, we started reaching out to some of them to see if
21 potentially, we could partner with them and utilize and
22 leverage the collectibles that they had.

23 Q. So you talked about E-Bay, talking with other collectors.
24 Did you do anything else, go to trade shows or things like
25 that?

1 A. Yes. We did go to trade shows. We started by going to a
2 couple of state shows in the State of Washington. Those are
3 usually held at community centers or high schools or community
4 colleges. And they have them in the gym for a whole weekend.
5 And these collectors drive from around the state, and they set
6 up a table. And most of them are there just to show their
7 collections. But they are selling things.

8 So we started going to those, and we actually would
9 bring a scanner with us. And some of them we were able to
10 buy, and -- buy collectibles from. And other ones, they just
11 wanted to show them. They didn't want to give them up. But
12 they found it very interesting that all we wanted to do is
13 plug the scanner into the wall and scan that image and pay
14 them a fee and allow us to scan that image.

15 And so we ended up buying some of the collectibles,
16 and other ones, we just got a digital scan of that sports
17 collectible.

18 Q. And I would imagine that in meeting with all these sports
19 collectors, maybe you encountered some quirky folks. Any
20 notable encounters with collectors?

21 A. Yes. So I was communicating with quite a few collectors
22 online. And there was an individual that I met online, and
23 his name was Larry. And he lived -- he ended up living about
24 an hour drive outside of Seattle. And so after talking with
25 Larry for a month about his collection via e-mail, Larry

1 invited me to his house. So I made the hour drive out to
2 Larry's house. All I knew is, you know, Larry was an avid
3 collector, and he had a collection that he said took up his
4 entire garage.

5 So I made the drive out there. Larry answers the
6 door. And Larry is about 6'6", and about 270 pounds, this
7 massive guy. And he brings me into his house. We walk
8 upstairs into a bedroom. And I said I thought it was all in
9 the garage. And he said well, wait until you see the garage.
10 It's entirely full. But this is my special addition, special
11 collection.

12 And so we walk in there, and come to find out,
13 Larry is a retired accountant. And Larry had taken binders,
14 and he had them all around the room on shelves. And each one
15 of them was labeled. And he says wait until you see. And I'm
16 just looking at all of the binders. And I said well, what do
17 you have? And he tells me well, I have -- I have a lot of
18 stuff. And the toughest ticket to find, the toughest sports
19 ticket to find are all the baseball all star games. That's
20 the most valuable ticket and the hardest one to find out
21 there. And those games started in 1933.

22 So I said do you have any of the major league
23 baseball all star games. And he said I have every single one
24 of them since 1954. And he pulls out a file, and he sits
25 there -- and they're all in plastic sheets, and they all have

1 a story written next to them. So I spent the next hour going
2 through those. And then he says I every major league baseball
3 game that's ever been played since 1967. And I just kind of
4 looked at him and he said if a world series had seven games, I
5 have all seven tickets. If it went four games, I have all
6 four tickets. And he pulls out a couple more binders. And we
7 sat there for the next couple of hours and went through them.
8 And then he pulls out all the Super Bowl tickets that had ever
9 been played.

10 And then he tells me that, because he grew up in
11 LA, and his dad took him to the first -- took him to his first
12 USC/Notre dame football game when he was five years old in
13 1954. And he said I've been to every single -- these teams
14 play each year. He said I've been to every single Notre Dame
15 and USC football game that's been played in LA since 1954.
16 And I have the game ticket and I have the program. And he
17 brings all of those out.

18 So I looked at Larry, and I say hey. Here's what
19 we're doing. I would love to be able to scan all of these
20 images and have you keep them. I just want to scan them. And
21 I'm willing to give you \$2,500 if you'll allow me to take just
22 these notebooks. I told him I'd give him my driver's license.
23 You know where I'm at. You know where I am. I wouldn't run
24 off with them. and I'll bring them back in two weeks.

25 And Larry started crying. He said, you know, my

1 worst fear is I've collected these my entire life. I have two
2 older daughters and they told me the first thing they're going
3 to do when I'm gone is they're going to call out somebody to
4 come and haul this stuff out of my house.

5 So I told him hey, our goal is one, is to build a
6 business around this, but it's to preserve the history of
7 these events. So Larry took my \$2,500 cash. I took those
8 back to Seattle at the office. We spent the next two weeks
9 scanning them. And I returned back out there and collected
10 more of his stuff and gave him another \$2,500.

11 Q. Now, when you're meeting with collectors, going to trade
12 shows, investigating on E-Bay for these sports collectibles,
13 are you just looking for anything and everything, or is there
14 certain things or certain types of items that you're looking
15 for?

16 A. Yeah. There's a criteria that we used. First and
17 foremost, you know, we're looking for historical images that
18 have some type of vintage artistic look to them. And so we
19 want anything that was pre 1989. We weren't looking for
20 anything that was older than the year 1989. So that was first
21 and foremost.

22 The next thing is we were making sure that every
23 single image didn't contain a copyright notice. So that's the
24 little C with a circle that you would see on an image. If
25 that was on there, we weren't going to use it. And then the

1 third thing was we were making sure that we didn't use any
2 images that were currently being used in the market, meaning
3 they weren't being used by the universities to -- for
4 educational services, and they weren't used by the
5 University's athletic departments.

6 And the fourth criteria was they had to be unique,
7 interesting, fun, or have some type artistic value that we
8 thought people would like to see on a mug, a shirt, or a hat.
9 And that was the criteria we used to search through these
10 historical images.

11 Q. Now you mentioned 1989 as sort of the newest of the
12 collection. What's the oldest, if you know, that you have in
13 your collection?

14 A. Yeah. So we have a ticket, a game ticket from 1869,
15 college football ticket. And we have a handful of things
16 before 1900, and then the collection starts mostly around the
17 1920s.

18 Q. Is there a predominant decade or a couple of decades for
19 which your collectibles originated, or is it pretty widely
20 distributed?

21 A. The most interesting stuff starts in the late 40s, early
22 50s. And really the 50s through the 60s is where you find the
23 most graphical art. If you think back in time, you know, the
24 t.v. started and Madison Avenue started, and you start to see
25 a lot of graphical elements. Photography came in vogue in the

1 60s, so there's a lot of great imagery. And so really the 50s
2 and 60s became an area we were really focused in finding
3 historical images.

4 Q. How many items on an approximate basis does Vintage Brand
5 currently own sports collectibles?

6 A. We have 25,000 sports collectibles. We've invested
7 \$250,000 in those collectibles.

8 Q. Now in the process of acquiring these collectibles, did
9 do you any research or investigation for yourself to kind of
10 learn about the context of when the memorabilia was first
11 produced?

12 A. Yes. So we have a historical dating process that we go
13 through. You know, the first is a lot of the collectibles we
14 have actually are dated. So you think of a game ticket, a
15 program for a game, a lot of the buttons have dates on them.
16 So that was -- that's kind of the first -- first part.

17 And then we go to the second one, and we are
18 acquiring these, particularly on E-Bay, a lot of times we're
19 buying what's called an allotment. And so instead of just
20 buying one individual item, there might be a collector that's
21 selling, like, 12 tickets or 12 game programs or, you know, 6
22 programs and a couple of buttons with it. So when you buy an
23 allotment, you could see that it was all from really the same
24 era, that the type fonts were the same, the imagery was the
25 same. And so something in that allotment would be dated. Not

1 everything, but maybe one or two things. So that would give
2 you a pretty good idea of when the rest of it was created.

3 And then the third one was we had developed
4 relationships with quite a few developers -- or with dealers.
5 And so we started talking with those dealers and saying hey,
6 we found this. When do you think this was created. And a lot
7 of these guys are experts in that arena and they would come
8 out and say hey, this is from the early 50s. And so, we had
9 those. And then we started finding things and saying, well,
10 gosh, we don't know when this is dated. You can go on E-Bay
11 and do an image search and look for something that's similar
12 on the same and maybe find two or three dealers that are
13 selling that same product online and see that all three of
14 them are listed as the same date.

15 So that was another way to determine the date of
16 these things. And then we did -- we used a site called sports
17 logos, dot net. This individual, Chris Kreamer, he started
18 this site in 1997. And he's become known as the authority on
19 sports logo history. And his website has all sports -- all
20 sorts of professional sports teams and colleges going back
21 before the 1900s and listing and showing the dates for all
22 those logos.

23 Q. Now you mentioned meeting with collectors and looking at
24 vintage game tickets and, you know, not knowing anything about
25 it, and may not think that vintage game tickets have anything

1 interesting from an artistic point of view. Can you tell the
2 jury a little bit about how these vintage game tickets that
3 you examined and ultimately acquired compare to modern day
4 tickets?

5 A. Yeah. So, you know, it's interesting to look at all
6 these tickets. They've changed so much over time, and a lot
7 of it has to do with technology's influence on the tickets.

8 So once you get into the 90s, you start seeing a
9 lot of type fonts. So instead of having imagery and really
10 cool graphics on a ticket, it starts to just be text.

11 And then as you get into modern times now, you
12 know, the tickets have entirely gone away. You know, you
13 either print it at home on a white piece of paper, or you're
14 using, you know, your smart phone to get into a game.

15 Q. Let's go ahead and take a look at some of the memorabilia
16 items from within the collection. And for now, we'll just do
17 the PowerPoint slides for the witness and Counsel and the
18 Court, if that's okay.

19 Mr. Hartvigson, I'm just going to ask you some
20 foundational questions to see if you recognize these photos
21 here. And we'll just have you take a look, and then we'll
22 scroll through the next page, please. Okay. Take a look at
23 those. And then next slide, please. And then the next slide,
24 please. Next slide, please. All right. And you can go back
25 to the start.

1 Now, Mr. Hartvigson, do you recognize the items
2 that are shown in these PowerPoint slides?

3 A. Yes, I do.

4 Q. And what are they?

5 A. These are sports collectibles that I acquired myself.

6 MR. FETTERS: Your Honor, I'd move to admit
7 exhibits -- it's going to be a long list -- maybe is there any
8 objection before I do that?

9 MS. WHEATLEY: No objection.

10 MR. FETTERS: Do you want me to read off the list?
11 All right. So this is Exhibit D-143, D-144, D-145, D-146,
12 D-203, D-206, D-215, D-147, D-166, D-148, D-167, D-232, D-236,
13 D-238, D-240, D-243, D-246, and D-250. Move to publish to the
14 jury.

15 THE COURT: And to admit?

16 MR. FETTERS: Oh, and to admit, yes.

17 THE COURT: Any objection?

18 MS. WHEATLEY: No objection, Your Honor.

19 THE COURT: Duly admitted. You may publish.

20 BY MR. FETTERS:

21 Q. All right. Mr. Hartvigson, the jury can now see what you
22 looked at briefly. And I do have physical items that I also
23 would like to admit in conjunction with -- they have the same
24 numbering. Okay. It's not for everything. But I do have the
25 buttons and with -- with the Court's permission, I'd request

1 to approach the witness.

2 THE COURT: You may do so.

3 BY MR. FETTERS:

4 Q. Now Mr. Hartvigson, can you just generally describe what
5 you have there at the witness stand and what the jury is
6 seeing on the screen?

7 A. Yes. These are the physical sports collectibles that we
8 see on the screen.

9 Q. Okay. And are these collectibles in relation to Penn
10 State?

11 A. Yes, they are.

12 Q. Now, you talked about some investigation and research
13 that you would do to try to date some of these items. For the
14 buttons that you see on the screen, does the information on
15 the buttons themselves provide any indication as to the dates
16 that these items were first originated?

17 A. Yes, they do. For instance, the first button here in the
18 upper left corner that says Cotton Bowl, Penn State, Penn
19 State's played in four Cotton Bowls, so we know that they --
20 they played their first one 1948, and then they played again
21 in 75 'and '76. We know this button is from 1976 from that
22 game, in particular, because there's identical button for the
23 team they played in that game.

24 Q. Okay. And there's -- I see there's one for the Gator
25 Bowl, as well. Is there a similar type of analysis that can

1 be applied for that one?

2 A. Yes. I believe they played in that game four times. 61
3 and 62 are the first two years and this is from 1976. And
4 it's similar. There's a button, that they played in that
5 event that also correspondence to that.

6 Q. And I'm going to ask you an obvious question. But the
7 button at the bottom right, is there any indication of when
8 that first originated?

9 A. Sure. So that has imprinted on it 1982.

10 Q. Okay. Let's go -- advance to the next slide, please.
11 And what are we seeing here?

12 A. These are football Game Day programs for Penn State
13 games.

14 Q. Okay.

15 MR. FETTERS: Permission to approach, Your Honor?

16 THE COURT: You may.

17 MR. FETTERS: For these, I'd also like to admit the
18 physical exhibits.

19 BY MR. FETTERS:

20 Q. What are those, Mr. Hartvigson?

21 A. These are the physical sports collectibles that are shown
22 here on the screen.

23 Q. Okay. Do -- well, let me ask you first. Are you
24 generally aware of what the purpose of a game program is?

25 A. Yes.

1 Q. What is that?

2 A. So a game program is printed specifically for that game.
3 And it usually has content related to that game. So rosters
4 for the games, some advertising, and maybe a few articles
5 written about the teams for that season or that particular
6 game.

7 Q. Now the artwork that we see on these game programs, it's
8 a little bit cartoonie. Is that kind of typical of a
9 particular era?

10 A. Yes.

11 Q. Tell the jury a little bit more about that, what era.

12 A. So the one on the left there, that's 1986. So you can
13 see some of the graphical animated components that are on that
14 program. And if you look at the second one, that's from 1985.
15 And then you get in to the next one that's split between Penn
16 State and North Carolina State. That's from 1967. You can
17 kind of see the contrast between the first one and that one.
18 And you can just tell just by looking at it, it's a little
19 older. You're not using as much color and the mascot images,
20 and it's a little more dull.

21 And then the last one there, that's from -- I'm not
22 sure what year that one's from. That one looks to be in the
23 70s, and it's got some animation there with the mascot and
24 then some photography down at the bottom.

25 Q. Okay. Let's take a look at this next slide here. What

1 do we see on the screen?

2 A. So we've got more collectibles. all but the one on the
3 far left are sports tickets, game tickets. The one on the far
4 left, we call that a game schedule. So that's showing the
5 schedule for Penn State in the 1947 season.

6 Q. Okay. And then how about here on this slide?

7 A. These are two pennants.

8 Q. Okay. And lastly, with permission of the Court to
9 approach?

10 COURTROOM DEPUTY: I don't think I have these
11 numbers.

12 MR. FETTERS: D-200 and D-201. Move to admit.

13 MS. WHEATLEY: No objection.

14 THE COURT: Duly admitted.

15 COURTROOM DEPUTY: I don't have the next ones
16 either.

17 MR. FETTERS: I thought I covered those. I'm
18 sorry. D-218, D-219, D-220, D-224.

19 MS. WHEATLEY: No objection.

20 THE COURT: Duly admitted, and you may publish, as
21 well. You also may approach the witness. Go ahead.

22 MR. FETTERS: Thank you.

23 BY MR. FETTERS:

24 Q. Mr. Hartvigson, what is it that I just handed you and
25 that the jury is looking at on their screens?

1 A. These are decals and stickers.

2 Q. Is there anything notable about any of these decals or
3 stickers?

4 A. Yes. The one in the lower left corner, this one here,
5 this one's really unique. This is from the early 1930s. And
6 the sports collector that I purchased this from is -- he is in
7 Berkeley, California, just off of Telegraph Avenue across the
8 street from the University of California. And I think he has
9 a citation from the books of world records as being the
10 largest collector in the world of music -- of music posters.
11 And for record album jackets.

12 And he's a musician himself. He is a creative
13 artist. And through his collections that he sells there in
14 his brick and mortar store. He at some point in time started
15 to collect sports decals.

16 And so he has -- this might be self-proclaimed, but
17 he has what he's calls the largest sports collectors --
18 sticker decals in the world. And so we've printed -- we've
19 purchased quite a few sports decals from him. And so this is
20 one of my favorites that we've purchased from him. I don't
21 think this is a depiction that I've seen. And he told me this
22 is the rarest of the collectibles of the decals that he had.
23 So we acquired this from him.

24 Q. Thank you, Mr. Hartvigson. You can set those to the
25 side.

1 So you've discussed the idea for Vintage Brand.
2 You've covered now the acquisition of Vintage Brand's
3 collection of 2500 different items of sports memorabilia.
4 What's the next step of actually getting this business going?
5 A. So we had to take those sports collectibles and manually
6 scan each one. It's a very tedious process to scan it. And
7 then once it's scanned, it gets uploaded to our database. And
8 then we have to go through it and enhance those images.

9 So a lot of these images are very old. You know,
10 the one I just showed you is nearly a hundred years old. We
11 have to make sure that the colors are right, that there's no
12 water damage, there's no blemishes on it. And some of the
13 lines between the colors have to be reinforced in order for
14 those images to be reproduced on additional items.

15 Q. The process that you just described, is that a time
16 consuming process?

17 A. Yes. Very time consuming.

18 Q. Would you be able to estimate how much time was invested
19 into that?

20 A. Yeah. Well, just to give you an idea, we have 25,000
21 images that we've taken and put on our server. And over six
22 years, we've had the time to put up 15,000 of those images.
23 There's still another 10,000 that we haven't been able to get
24 to.

25 Q. Now, other than just the time limitations, are there

1 other reasons why you may not scan an item or even if you do
2 scan an item, not actually use it as a Vintage Brand product
3 offering?

4 A. Sure. So like I shared with you, a lot of this is
5 purchased on E-Bay. So we'll see the image on a computer
6 screen, buy it. It shows up, and I would have it all shipped
7 to my house. And I would look at everything and inspect it
8 when I received it. And there are quite a few things that
9 contain copyright notices. So we would take those, throw it
10 downstairs in the basement. And everything that was usable, I
11 would take to the office and then the team would scan them.

12 Q. Can we take the PowerPoint presentation down just to --
13 stop publishing to the jury. I think there might be one more
14 slide that I didn't ask about.

15 This is D-183, D-202, D-204, and D-207.

16 MS. WHEATLEY: No objection.

17 THE COURT: You're moving for admission only at
18 this point?

19 MR. FETTERS: Yeah. Move to admission D-183,
20 D-202, D-204, and D-217.

21 THE COURT: Duly admitted.

22 MR. FETTERS: Permission to publish?

23 THE COURT: You may publish, as well.

24 BY MR. FETTERS:

25 Q. Now, Mr. Hartvigson, what are we looking at here?

1 A. So these are additional Penn State sports collectibles
2 that I published.

3 Q. Okay. Just because vintage brand has an item of
4 memorabilia, I think I asked you, does that mean that it ends
5 up on the website. Do you know if the designs from these
6 items of memorabilia made it up onto the Vintage Brand
7 website?

8 A. So these designs did not make it up, and the reason why
9 is through the process of evaluating these images, we
10 determined that these are marks that the school is currently
11 using.

12 Q. And the button on the right just says Penn State. There
13 really isn't any additional artwork. Does Vintage Brand offer
14 any products across the board that are just the names of a
15 university or just text alone?

16 A. No.

17 Q. All right. Now, you touched on already the image
18 enhancement process. Is what the jury is looking at on the
19 screen -- and let's go ahead and take that down.

20 So what we're looking at -- Mr. Hartvigson, can you
21 identify what we're looking at here on the screen?

22 A. Yes. These are sports collectibles on the left, and on
23 the right, that's the enhanced version of the graphic.

24 Q. Okay.

25 MR. FETTERS: Your Honor, I'd move to admit D-236,

1 D-254, D-9, and D-8.

2 MS. WHEATLEY: No objection.

3 THE COURT: Duly admitted.

4 MR. FETTERS: Permission to publish.

5 THE COURT: You may publish, as well.

6 BY MR. FETTERS:

7 Q. So again, Mr. Hartvigson, is there demonstrating the
8 image enhancement process from left to right?

9 A. Yes.

10 Q. Okay. All right. I think we can take down the
11 PowerPoint. Thank you. So we've now walked through the
12 process of acquiring the vintage sports collectibles, scanning
13 those collectible, enhancing those collectible. Let's now
14 talk about the Vintage Brand website.

15 Can we bring up Plaintiff's Exhibit 263. And I
16 believe this has been admitted already.

17 MR. FETTERS: And permission to publish?

18 COURTROOM DEPUTY: It has not been admitted.

19 MR. FETTERS: Oh, it has not.

20 BY MR. FETTERS:

21 Q. Mr. Hartvigson, do you recognize what -- what you see
22 here as Plaintiff's Exhibit 263?

23 A. Yes. This is the Vintage Brand home page.

24 Q. All right. Is this a screenshot of the Vintage Brand
25 home page?

1 A. That is correct.

2 MR. FETTERS: Move to admit Plaintiff's Exhibit
3 263.

4 MS. WHEATLEY: No objection.

5 THE COURT: Duly admitted.

6 MR. FETTERS: Permission to publish

7 THE COURT: And you may publish to the jury.

8 BY MR. FETTERS:

9 Q. Okay, Mr. Hartvigson, by now, the jury has seen quite a
10 bit the Vintage Brand home page. I don't want to belabor T.
11 Built let's go through it with your guidance.

12 So first thing, let me ask you this. What is the
13 Vintage Brand website, the URL?

14 A. WWW dot Vintage Brand dot com.

15 Q. Are Vintage Brands's products sold anywhere other than
16 at the URL you just described?

17 A. No. We only sell products on our domain at Vintage Brand
18 dot com.

19 Q. Okay. So I'd like you to point out some of the features,
20 how this home page is generally organized, if you could just
21 give the jury an orientation of how this is laid out, please.

22 A. Sure. So if you look at the top of the left corner of
23 the page, you'll see the Vintage Brand logo with our V and the
24 name Vintage Brand. And then as you see across the top, the
25 navigation there, you'll see different channels or categories

1 that we sell, historical images in. So the first one is
2 college. And then baseball, football, and basketball. So
3 those are all different historical images or different teams
4 and colleges. And then we have vintage athletes. Those are
5 vintage athletes who have helped us help create their own
6 personal brands. And so we've created those brands for them
7 and share up to 50 percent of the sales with them directly.

8 And then in the More area, that's has additional
9 things. We have historical items for the Orange Bowl, the
10 Rose Bowl, the Fiesta Bowl and then a lot of famous boxing
11 events that have happened over the last 100 years.

12 Q. And if we scroll down to the top college designs, there's
13 a grouping of products there.

14 Let me first ask, do any of the products that we
15 see here on the Vintage Brand home page, do any of those
16 actually exist right now?

17 A. No. So none of the products on Vintage Brand website
18 actually exist. These are all dynamic, meaning that they're
19 made on demand with images and products. And once a consumer
20 places an order for these products, then we actually print
21 that product in our facility and send it directly to the
22 consumer.

23 Q. And the artwork that we see on these t-shirts, did that
24 artwork derive from memorabilia items?

25 A. Yes. All of the artwork you see here came from

1 historical images and sports collectibles.

2 Q. It looks like top college designs what's top college
3 designs mean? Why is that there?

4 A. If you -- are you asking if you clicked on that?

5 Q. Yeah. Exactly?

6 A. If you clicked on that link right there, that button that
7 says shop college, then you would go to a page that has
8 hundreds of different colleges and images showing all those
9 images that consumers have liked the most on a single page.

10 Q. And the product mock-ups we see here on these t-shirts,
11 is that artwork all related to a single university or team?

12 A. No. Those are all different colleges there.

13 Q. Okay. And if we scroll down a little bit, please. The
14 next one or heading -- we can actually go down to the next
15 page. It's split a little bit. But yeah, retro sweatshirts.
16 If I were to click on that, what might you see?

17 A. It would be very similar. You would click on it and you
18 would see hundreds of different sweatshirts with different
19 historical images from all different teams.

20 Q. Okay. And then scrolling down a little bit. It looks
21 like the next section there is favorite tees. What's that a
22 hyperlink to?

23 A. This hyperlinks to some of our best selling tee shirts,
24 again, with historical images from all different colleges.

25 Q. And then scrolling down a little bit more, it looks like

1 new Vintage designs. What would that go to?

2 A. So this would go to the newest designs that we've
3 uploaded into the website. So if you wanted to come back and
4 I've already gone through all the pages, which would be very
5 difficult because there's quite a few pages. But if you came
6 back and just want to see what he's new, those are all
7 highlighted in that section.

8 Q. Okay. And then we can scroll down kind of toward -- keep
9 going. Keep going. Yeah kind of toward the bottom, the
10 Contact Us is kind of what I'm looking for. Let's pause here
11 for a second. It looks like this may be customer reviews; is
12 that right?

13 A. That's correct.

14 Q. Tell the jury a little bit about how --

15 MS. WHEATLEY: Objection. Hearsay.

16 MR. FETTERS: I'm going to ask him the process
17 about how uploading the customer reviews worked.

18 MS. WHEATLEY: Objection. They're up here on the
19 screen.

20 MR. FETTERS: This isn't offered to prove the
21 matter asserted.

22 MS. WHEATLEY: Objection. Can we take this down.

23 THE COURT: Who is it displayed to at this point?

24 MR. FETTERS: It's been admitted.

25 MS. WHEATLEY: It's to the jury, but he is

1 obviously displaying the customer reviews. He doesn't need to
2 display them to talk about how they are uploaded.

3 MR. FETTERS: The document's been admitted. It's
4 not being offered to prove the truth of the matter asserted.

5 THE COURT: It's being offered for what purpose?

6 MR. FETTERS: That customers have the ability to
7 submit reviews, and ultimately, the next question is can
8 customers reach out contact Vintage Brand.

9 MS. WHEATLEY: 402 and 403 for the fact that
10 customers can submit reviews. I don't see the relevance at
11 all.

12 THE COURT: The objection is noted. It's
13 overruled. You may -- you may display and you may question
14 the witness regarding this exhibit.

15 MR. FETTERS: Thank you, Your Honor.

16 BY MR. FETTERS:

17 Q. Is there a way for customers to submit reviews on the
18 Vintage Brand website?

19 A. Yes. All of the pages allow for reviews, and we actually
20 encourage reviews. So after you order a product from us, we
21 ask you to give a review at that point about the shopping
22 experience. And then after you receive the product, we send
23 you both a text message and an e-mail asking for your honest
24 review. As an online business, our business is scrutinized
25 more than a brick and mortar retailer. Online, somebody can

1 go in and do a review.

2 If somebody is looking to buy something here, they
3 can easily click on a button and go and look at the reviews.
4 It's very easy to find. So if we're not getting good reviews,
5 if we going to run a successful business, we want to make sure
6 we're doing a really good with service. We want to make sure
7 we're doing a really good job with quality.

8 And we ask for reviews. And one of the reasons is
9 we're offering so many different images, and we're offering so
10 many different products, that if something is not working well
11 and somebody has a problem with it, we want to know so we can
12 go back and look at it. And if we're getting multiple poor
13 reviews for a certain image or a certain product, we can go
14 back and pull that off and make sure that it's not out there
15 and nobody else has that experience.

16 Q. Does Vintage Brand have the ability to edit the text of
17 reviews that are posted?

18 A. Yes, we can. But one of the biggest challenges --

19 MS. WHEATLEY: Objection, Your Honor. I'll renew
20 the objection. Now he's talking about the ability to edit the
21 reviews. They're hearsay, and I don't see the relevance .
22 402. 403.

23 MR. FETTERS: We're not offering it to prove the
24 truth of the matter asserted. We're just offering it for the
25 circumstances in which Vintage Brand might remove it or review

1 if. The witness would testify about those types of
2 circumstances. That's all it's being offered for.

3 THE COURT: Objection's noted. It's overruled.
4 You may display the to the witness. Go right ahead.

5 THE WITNESS: Can you repeat the question?

6 BY MR. FETTERS:

7 Q. Yeah. Does Vintage Brand have the ability to either edit
8 or remove a review?

9 A. Yeah. So there's two components to it. If someone's
10 using it as a service review saying hey, how do I return
11 something, we don't want that being posted. It doesn't have
12 anything to do with the product.

13 Contrary to that, we want negative reviews to be on
14 the site. If you have a poor experience, we want to know. If
15 something doesn't fit, we want to know. If the image isn't
16 working, we want to know. And we want to know if the
17 description is well. One of the largest challenges you have
18 as an online apparel retailer is sizing and fabrication.

19 So we're so used to being able to touch apparel
20 items that you we buy and we're so used to being able to try
21 something on at a brick and mortar store that we don't get
22 that opportunity online. So we rely on the customers to be
23 able to tell other customers their experience and what they
24 think. So if somebody is looking for a thick sweatshirt and
25 they receive it and it's a thin sweatshirt, we want those

1 voices heard so the next consumer will say oh, this is a thin
2 sweatshirt. Maybe I want to try to find something a little
3 thicker. So we use those customer reviews to help. And we
4 also use them to help improve our business.

5 Q. Now, down here at the bottom, it looks like there's a
6 Contact Us hyperlink; is that right?

7 A. Yes, that's correct.

8 Q. And I think we have another screen shot that would show
9 what you would go to if you clicked that.

10 Can we go ahead and take the presentation down,
11 please. And if you could pull up Plaintiff's Exhibit 264.
12 Mr. Hartvigson, do you recognize this screenshot?

13 A. Yes, I do.

14 Q. What is it?

15 A. That the contact page for consumers to contact Vintage
16 Brand.

17 Q. All right.

18 MR. FETTERS: Move to admit exhibit Plaintiff 264.

19 MS. WHEATLEY: Objection. But I understood it was
20 already admitted.

21 MR. FETTERS: Oh, if it's already admitted, then I
22 withdraw that.

23 THE COURT: Mrs. Rhinehart?

24 COURTROOM DEPUTY: No, it's not.

25 MS. WHEATLEY: It's not. Then objection for the

1 hearsay reasons that I articulated earlier.

2 MR. FETTERS: It's a way to submit contact e-mails
3 to the company. It's not hearsay. It's not being offered for
4 the truth of the matter asserted. It's to explain how
5 customers, prospective customers can send communications to
6 Vintage Brand.

7 MS. WHEATLEY: He just articulated that it is being
8 submitted for the truth of the matter asserted, which is the
9 -- this is the way you can submit this information.

10 MR. FETTERS: This is a screenshot of a website.
11 This is not being offered -- there have been multiple
12 screenshots of the Vintage Brand website displayed throughout
13 the Plaintiff's case.

14 THE COURT: Objection noted. Overruled. Go ahead.

15 MR. FETTERS: Permission to publish?

16 THE COURT: You may publish, as well.

17 COURTROOM DEPUTY: And it's admitted?

18 THE COURT: Yes. It is admitted. The objection to
19 the admission is overruled and you may publish to the jury.

20 MR. FETTERS: Thank you.

21 BY MR. FETTERS:

22 Q. Mr. Hartvigson, can you please explain again what we see
23 on the page?

24 A. Yes. That's the contact page for consumers to contact
25 Vintage Brand.

1 Q. Okay. Is there an e-mail address that's listed here?

2 A. Yes, there is.

3 Q. And what is that e-mail address?

4 A. Customer service at shop Vintage Brand dot com.

5 Q. And what is meant by direct message?

6 A. Direct message is a chat message. So nine hours a day,
7 Monday through Friday, our customer service team is there. If
8 you want to chat live with an agent, you can do that. And
9 then seven days a week, you can send an e-mail in and our goal
10 is to respond to those e-mails within 24 hours.

11 Q. As part of this litigation, did you do any investigation
12 in terms of whether Vintage Brand had e-mails or chat messages
13 from customers related to artwork relating to Penn State?

14 A. Yes, I did.

15 Q. And do you know if those e-mails and chats were produced
16 to the University in the course of had litigation?

17 A. Yes, they were.

18 Q. Did you personally review those communications yourself?

19 A. Yes, I did.

20 Q. Okay. We can take this one down. Now, before we get in
21 to discussion of the Vintage Brand pages related to Penn
22 State, I want to back up first and talk about do you know
23 generally the time frame when those web pages on the Vintage
24 Brand website featuring artwork related to Penn State, when
25 those became live and accessible to the public.

1 A. Yes. That would have been April of 2018.

2 Q. Okay. And then did those web pages come down for any
3 reason, and if so, when?

4 A. Yes. We took those down in August of 2021.

5 Q. Why did you do that?

6 A. Penn State filed a federal lawsuit in June of 2021. And
7 we made the decision to take down the Penn State historical
8 images pending the outcome of the complaint.

9 Q. And after Vintage Brand took those web pages related to
10 artwork related to Penn State down, did Vintage Brand
11 thereafter put them back up?

12 A. Yes. We were asked to put those back up in February of
13 2022, pending a discovery in this case, so both sides could
14 take screenshots of the website.

15 Q. And about how long would you estimate that they were up
16 in February, 2022?

17 A. I believe it was about two weeks.

18 Q. Okay. And then so after that two-week period, did they
19 go back down?

20 A. Yes, they did.

21 Q. Okay. And then after that, did they -- those web pages
22 go back at any point?

23 A. Yes.

24 Q. When was that?

25 A. I think it was in August and September of 2023.

1 Q. Of 2023 or 2024?

2 A. 2024. I'm sorry.

3 Q. And what was the purpose for that?

4 A. That was when both sides, Penn State first requesting
5 sample products be manufactured and printed for trial.

6 Q. And you've seen various witnesses hold up Vintage Brand
7 products throughout trial. Is that what you're referring to,
8 so that those products could be manufactured?

9 A. That is correct.

10 Q. All right. I want to talk about a very specific period,
11 and that's the summer of 2022. Do you know if the Vintage
12 Brand web pages with artwork relating to Penn State were live
13 and accessible to the public in the summer of 2022?

14 A. No, they were not.

15 Q. How sure are you?

16 A. I'm 100 percent sure.

17 Q. You were here when Meghan Maffey testified via video
18 deposition; is that correct?

19 A. That is correct.

20 Q. If we could bring up Plaintiff's Exhibit 73, which I
21 understand has already been admitted and publish to the jury.
22 Now, do you recognize this to be the e-mail that Ms. Maffey
23 discussed in her video deposition?

24 A. Yes.

25 Q. And do you see the date that's placed on this e-mail at

1 the top right?

2 A. Yes. It's August 1st, 2022.

3 Q. Okay. Do you recall what she said in terms of when she
4 believes she visited the Vintage Brand website?

5 A. Yes. It was either on that date or a few days before
6 that.

7 Q. Okay. And is it possible that Ms. Maffey viewed the
8 Penn State-related web pages or any designs on the Vintage
9 Brand website related to Penn State in the summer of 20 22?

10 A. No.

11 Q. How sure are you?

12 A. I'm 100 percent sure.

13 Q. Now, do you recall Ms. Maffey also testifying that --
14 well, let me ask you this. Just because the Vintage Brand web
15 pages with artwork related to Penn State were down, was the
16 rest of the Vintage Brand website up, the home page, for
17 example, the pages represented to other schools?

18 A. Yes, it was.

19 Q. Okay. So it's possible that Ms. Maffey viewed other
20 aspects of the site?

21 A. Yes. That is correct.

22 Q. Do you recall Ms. Maffey testifying also that she
23 recalled seeing the chipmunk logo and the paw print logo?

24 A. Yes, I do.

25 Q. Did you have occasion to hear other witnesses testify and

1 identify the look of those two logos?

2 A. Yes.

3 Q. Has Vintage Brand at any time sold or offered, put on its
4 website any designs featuring the chipmunk logo?

5 A. No.

6 Q. Has Vintage Brand put up on its website or offered to
7 sell at any time any products featuring the paw print logo?

8 A. No.

9 Q. Okay. All right. Let's take a look now at a screenshot
10 of the Vintage Brand designs relating to Penn State. So if we
11 could put up Defense Exhibit 13. And I believe this has been
12 admitted. It may be a different version. Do you recognize
13 this screenshot, Mr. Hartvigson?

14 A. Yes, I do.

15 Q. What is it?

16 A. This is a page on the Vintage Brand website featuring
17 historical images of Penn State.

18 Q. Okay.

19 MR. FETTERS: Move to admit Defense 13.

20 MS. WHEATLEY: Can you can you scroll so I can see
21 the whole thing? Is that the entire --

22 MR. FETTERS: There should be more.

23 MS. WHEATLEY: No objection.

24 THE COURT: Duly admitted.

25 MR. FETTERS: Request to publish?

1 THE COURT: You may publish.

2 MR. FETTERS: We can go back up to the top there.

3 Thank you.

4 BY MR. FETTERS:

5 Q. So again, Mr. Hartvigson, what is it now that the jury is
6 looking at?

7 A. This is a page on the Vintage Brand website that features
8 historical images of Penn State.

9 Q. Okay. And again, as we did with the home page, can you
10 just orient the jury to sort of the layout of this -- these --
11 of this web pages in a general sense?

12 A. Yeah. So at the top, you'll see different product
13 categories. Going left to right, t-shirts and sweatshirts and
14 hats. That's the very top there, that's different categories
15 that you can go to. So you could -- if you clicked on
16 colleges, there's roughly 350 different colleges featured on
17 the website with historical images for each of them. And then
18 if go across the top, baseball would be -- there's major
19 league baseball teams in there with their historical images.

20 And then you go to football. There's NFL teams in
21 there with their historical images. If you go to basketball,
22 there's NBA teams with their historical images. And as you
23 come down the page, there's -- you can go to different product
24 categories, and that would start to segment out these images
25 that you see on the page of what's available at each one of

1 these product categories.

2 Q. Okay. And is it currently clicked to the All setting?

3 A. It is.

4 Q. And what -- because that's clicked, what is the result?

5 A. You're seeing all of the products that are available with
6 historical images of Penn State.

7 Q. Okay. And you can go and eliminate that. And just to
8 give the jurors a sense of what those product offerings are,
9 if you could scroll at, you know, a leisurely pace down so
10 they can a sense of that.

11 Now again, are any of these products in existence
12 right now in a general sense?

13 A. No.

14 Q. Are these, then, just digital mock-ups?

15 A. That's correct.

16 Q. And it seems as though we see a wide variety of different
17 artwork from memorabilia; is that correct?

18 A. Yes.

19 Q. So what's the point of having a landing page like this
20 for -- from your perspective, what's the point of organizing
21 it this way for the consumer?

22 A. Well, a consumer can look at this page and scroll down
23 and see all the different images and graphics that are
24 available.

25 Q. Okay. I see there's a 30 percent off discount code. Can

1 you just explain to the jury generally how Vintage Brand's
2 discounting works?

3 A. Yeah. So this was taken sometime ago. We currently have
4 another offer on the site. Everything's 50 percent off.
5 We're making everything on demand, so it's extremely
6 efficient. We're trying to provide products at the lowest
7 price point we can for consumers. So here, this is showing
8 the products are 30 percent off. You can see that in --
9 underneath each image, you've got a red highlighted prices.
10 What the price is -- the price of each item on the page there.

11 Q. Now I see a heading. It says Penn State Nittany Lion
12 designs. Do you see that?

13 A. Yes.

14 Q. Why is it called that? What is the purpose of that?

15 A. That's a header. And it's a description of what is on
16 the page.

17 Q. A description of the products?

18 A. Yes.

19 Q. Okay. And is there -- can we zoom on that, please,
20 Brock. That red box that you just -- and what's written
21 underneath that description of the products?

22 A. It reads Vintage designs not affiliated with, licensed,
23 or sponsored by any college, team, or league.

24 Q. Now, Mr. Hartvigson, we're looking at pdf screenshots of
25 the website, right. Is that -- is that exactly how the

1 consumer is going to see this and experience this when they're
2 either on their web browser on on their mobile phone?

3 A. No.

4 Q. How -- what would be some of the differences between
5 looking at screenshots here in court and what it might look
6 like on a computer or a mobile phone?

7 A. Yeah. So the page is stretched out a lot longer here.
8 If you were to look at this on your phone, it's a lot thinner,
9 so the phone gets about this thin. (Indicating). What we've
10 done is we've put the -- what we call the disclaimer there
11 that's highlighted on the page, we've made that in the largest
12 possible print that we could possibly do to get it on your
13 phone. We don't want you to have to scroll across and read
14 that disclaimer. We want you to see the whole thing. So we
15 put it as large as we could possibly can to get that entire
16 message on your screen. So it's on the top of the page. It's
17 one of the first thing that you see.

18 Q. Now, there's also above the version -- the disclaimer,
19 there's highlighted there what looks like there's a scrolling
20 box above that. Can you tell the jury what that is?

21 A. Yeah. So that's what we would consider marketing. That
22 is talking about what's available at Vintage Brand. So it
23 goes through and talks more about the products and the
24 categories specifically that we sell. And within that, we
25 also included additional disclaimers.

1 So in case you miss it in one spot and you want to
2 look and see what else is available on the website, there's an
3 additional disclaimer in there.

4 Q. Okay. And because, again, this is a pdf screenshot as
5 opposed to the real thing, are we able to scroll through this
6 version that we see right now?

7 A. No. Not on this flat pdf.

8 Q. And we can go ahead and take that down. And then just
9 for the witness and Counsel's benefit and the Court's, can we
10 put up Defense 321(b) please. Do you see that?

11 A. Yes.

12 Q. And what do you recognize this verbiage to be?

13 A. This is the marketing verbiage that was in that scroll
14 down that you highlighted.

15 Q. Okay. So what I would ask for you to do is please read
16 that aloud for the jury.

17 A. Shop Penn State Nittany Lions Vintage designs for
18 apparel, clothing, gear, and merchandise for all sports
19 Fanatics at the Penn State Nittany Lion shop on Vintage Brand
20 dot com. Vintage Brand is not affiliated with the Penn State
21 Nittany Lion book store or the Penn State Nittany Lions. Shop
22 historic Penn State Nittany lions fan gear and Vintage college
23 apparel to give your team the ultimate home field advantage.
24 The Vintage Penn State Nittany Lion store has throw back
25 {nint} clothing and Vintage sports merchandise, including old

1 school Penn State Nittany Lion mascots. Visit hip Vintage
2 Brand to choose from thousands of retro sports, mascots and
3 Fanatics merchandise in the Penn State Nittany Lion sports
4 shop, including Penn State Nittany Lion t-shirts, sweatshirts,
5 hoodies, jerseys, long-sleeve shirts, hats, lids, socks,
6 koozies, mugs, drinkware, posters, canvas, pennants, and more.

7 Vintage Brand is not affiliated with the NFL shop,
8 Major League Baseball shop, the NBA store, or NCAA shop.
9 Find the ultimate selection of vintage Penn State Nittany
10 Lions football jerseys, baseball jerseys, or basketball
11 jerseys for all sports Fanatics. Visit the Penn State Nittany
12 Lions sports store on Vintage Brand today.

13 Thank you, Mr. Hartvigson. Who made the decision
14 to include disclaimers on the Vintage Brand website?

15 A. That would be me.

16 Q. Why?

17 A. We wanted to make it very clear that we were not
18 affiliated, associated, sponsored by Penn State. That we do
19 not have a license with Penn State, and that Penn State, in no
20 way or form guarantees the quality of the Vintage Brand
21 products, nor does Vintage Brand have a license with Penn
22 State.

23 Q. Are there any pages on the Vintage Brand website that
24 lack this disclaimers like the one that you just read?

25 A. No. Every single page contains four different

1 disclaimers.

2 Q. On any page of the Vintage Brand website, are there
3 statements proclaiming to offer officially-licensed
4 merchandise?

5 A. No.

6 Q. Does Vintage Brand offer any officially-licensed
7 merchandise?

8 A. No.

9 Q. All right.

10 MR. FETTERS: All right. We can take that one
11 down.

12 BY MR. FETTERS:

13 Q. Let's take a look now as to a specific page of artwork
14 relating to Penn State. Can would pull up for the witness,
15 Counsel, and the Court only Defense Exhibit 13.

16 My apologies. Let me move forward here in my
17 outline. Let's go to Defense Exhibit 11.

18 All right, Mr. Hartvigson, hopefully you can see
19 that on your screen. Do you recognize what you're seeing here
20 often the screen?

21 A. Yes, I do.

22 Q. What is it?

23 A. It's a Vintage Brand page on the website that's featuring
24 a mug with a historical image of Penn State.

25 Q. And, Brock, if you could just scroll down for Counsel and

1 the Court's benefit to see the page. I believe there's a
2 second page, as well.

3 Move to admit Defendant's Exhibit 11, please.

4 THE COURT: Any objection?

5 MS. WHEATLEY: No objection.

6 THE COURT: Duly admitted.

7 MR. FETTERS: Move to publish

8 THE COURT: And you may publish.

9 BY MR. FETTERS:

10 Q. Mr. Hartvigson, can you describe for the jury what
11 they're seeing on the screen, what we're looking at here?

12 A. Yeah. This is a page on the Vintage Brand website that's
13 featuring a mug with a historic image of Penn State.

14 Q. I want to ask you a question first. There -- toward the
15 top left under the black discount bar, it says leagues,
16 college teams. Do you see where I'm looking at, the -- yeah.

17 Q. What is the purpose of that? Why is that there?

18 A. That's referred to as a bread crumb. And so that's a
19 common practice on all websites, particularly in a retail
20 websites. So it allows the consumer to see where they are in
21 the shopping experience.

22 Q. Okay. I won't bring up the exhibits of the memorabilia
23 item, but hopefully folks remember there was a decal with
24 artwork that looks similar to this; is that right?

25 A. That's correct.

1 Q. Maybe you have it next to you there. Do you know --
2 what's the exhibit number on that?

3 A. 219.

4 Q. Okay. Exhibit 219. So is that what we're seeing on the
5 product page on the screen, is that an enhanced image that
6 derived from the decal that's to your right?

7 A. That's correct.

8 Q. And then so the right of the image on the mug, there's
9 words that says 1950 Penn State Nittany Lion mug with some
10 text beneath that. What is generally -- why is that language
11 there on the right?

12 A. That's a historical description of the image.

13 Q. Okay. Let's start first with the 1950 Penn State Nittany
14 Lions mug description. Why does it say 1950?

15 A. Because we believe this image originated from 1950.

16 Q. And can you remind the jury what Vintage Brand's sort of
17 standard practice and procedures were to investigate when the
18 images from sports memorabilia, to your best estimate, were
19 first put out?

20 A. Yeah. So we -- you know, we have a historical dating
21 process. We go through a variety of references on the
22 Internet. I think I shared sports logos dot net, different
23 sports collectors, E-Bay listings and cross reference those
24 listings to come up with a date that we establish and publish
25 on our website.

1 Q. Okay. And it looks like underneath that description,
2 there's another disclaimer; is that right?

3 A. That's right.

4 Q. What's that disclaimer say?

5 A. It says by Vintage Brand is not affiliated with or
6 sponsored by Penn State Nittany Lion.

7 Q. Okay. And then below that, there's a description -- I
8 won't ask you to read it entirely to the jury, but are you
9 familiar with what this description entails?

10 A. Yes.

11 Q. Can you just summarize that for the jury?

12 A. Yeah. It basically outlines the history of the Nittany
13 Lion mascot and how that name came about.

14 Q. Okay. And were you here when Ms. Esposito was
15 testifying?

16 A. Yes, I was.

17 Q. Did you hear her have a critique as to this description?

18 A. Yeah. I think we agreed on how it originated, Joe Mason
19 in 1907, a former baseball player. I think the discrepancy
20 was in -- in our description. It says that he was embarrassed
21 that they used the name that he created. And she countered we
22 that he was excited, so, this came from public sources, you
23 know, so I -- I'm not sure. We would be glad to correct that,
24 in that's easily to be corrected.

25 Q. On that point, if the customer or not even a customer

1 were to communicate, send an e-mail to Vintage Brand,
2 suggesting that something be corrected, would that be
3 something that Vintage Brand would consider and I do?

4 A. Oh, we would love that. That's, you know, we call that
5 crowd sourcing from consumers. The more information they can
6 provide us, great. If there are historical errors in
7 descriptions or anything on the website, yeah, we want to hear
8 that.

9 Q. Okay. Now, describe how the verbiage we've been looking
10 at describes the image on the mug. Let's scroll down a little
11 bit, Brock. I see a section, product detail. Keep going. I
12 don't think we need to zoom in on. But what's the general
13 purpose of product details?

14 A. That's the description of the physical product outside of
15 the image. So here, you know, it's a -- how many ounces the
16 mug is, what's the, fabrication. It's a ceramic much. It's
17 lead-free and it's microwave safe.

18 Q. Okay. And we can keep going, scrolling down. What do we
19 see here?

20 A. These are additional products that same image is
21 available on.

22 Q. Okay. And what would happen if someone were to click on
23 these products? Would that hyperlink to another product page?

24 A. Yes. We would end up on a product page for that item
25 that looks very similar to this, but you would just have that

1 product featured on the page.

2 Q. Okay. We can go ahead and take this exhibit down, Brock.
3 Thanks. Now, if we could bring up for Counsel and the Court,
4 Plaintiff's Exhibit 302, please. And, Mr. Hartvigson, do you
5 recognize what's on the screen?

6 A. Yes. Yes, I do.

7 Q. What is it?

8 A. These are two Vintage pennants.

9 Q. And I don't plan to show anything other than right here.
10 But I can scroll down if you'd like to see more.

11 MS. WHEATLEY: If that's all you're showing --
12 well, actually, if you're going to admit it, I should see it.

13 MR. FETTERS: Can you zoom out and scroll down so
14 Ms. Wheatley can see it, please.

15 MS. WHEATLEY: No objection.

16 MR. FETTERS: Move to admit Plaintiff's Exhibit
17 302, please.

18 MS. WHEATLEY: I have no objection.

19 THE COURT: Duly admitted.

20 MR. FETTERS: Move to publish.

21 THE COURT: You may publish.

22 BY MR. FETTERS:

23 Q. So now the jury is seeing what you're seeing,
24 Mr. Hartvigson. Can you repeat again what we're looking at?

25 A. These are Vintage pennants. The product mockups that we

1 eon the Vintage Brand website, did these derive from sports
2 memorabilia owned by Vintage Brand?

3 A. Yes, they do.

4 Q. Okay. Let's take a look at that -- let's go ahead and
5 take that down, Brock, and bring up for the witness only
6 Plaintiff's Exhibit 245. And what is it that you see at
7 Plaintiff's 245?

8 A. I see the physical sports collectable pennant.

9 Q. And is this an actual memorabilia owned by Vintage Brand?

10 A. That's correct.

11 MR. FETTERS: Move to of admit Plaintiff's Exhibit
12 245.

13 MS. WHEATLEY: No objection.

14 MR. FETTERS: And publish.

15 THE COURT: You may publish.

16 BY MR. FETTERS:

17 Q. This is an item of memorabilia within Vintage Brand's
18 collection?

19 A. Yes.

20 Q. Okay. And then we can take that down and then bring up
21 Plaintiff's Exhibit 247, please, for the witness only. Do you
22 recognize this, Mr. Hartvigson?

23 A. Yes. This is another Vintage pennant.

24 Q. Owned by Vintage Brand within its collection of
25 memorabilia?

1 A. Yes.

2 Q. Okay.

3 MR. FETTERS: Move to admit --

4 COURTROOM DEPUTY: It's already admitted.

5 MR. FETTERS: Move to publish

6 THE COURT: You may publish.

7 BY MR. FETTERS:

8 Q. Okay. With this in mind, I want you to bring back to the
9 screen shot of the pennants from the Vintage Brand website and
10 I want to ask -- well, let me ask you first. Were you -- did
11 you hear witnesses describe that there were some errors in the
12 Vintage Brand product that derived from this pennant?

13 A. Yes, I did.

14 Q. And what is your explanation for those errors?

15 A. Yes. So those were human errors. The pennants were a
16 late edition to the collectible that we've added to the
17 website. One of the challenges with the pennants is the
18 dimensions. They're extremely long. So when we put those on
19 a scanner to scan, we have to do three scans of that pennant.
20 So it's about this long. The scanner is only so big. And so
21 we were manually scanning all of those. It appears that the
22 state portion of this pennant, the last third of that product
23 was omitted from the scan. And so we have one individual
24 scanning, and that's going into a database file. And then
25 there's whole other group of people that are doing the

1 enhancements. So somebody received a partial -- the scanned
2 pennant, not knowing that there was an additional portion of
3 it. And it produced that and published it to the website.

4 Q. Okay. You can take that down. In the course of this
5 trial, have you become aware of any other errors in relation
6 to the scanning enhancement process as it relates to the
7 artwork relating to Penn State?

8 A. Yes.

9 Q. What is that?

10 A. There was a TM that was left on the S lion image on the
11 Vintage Brand website.

12 Q. When you say it was left on, what do you mean by that?

13 A. So the collectable that we used, the decal for the S
14 lion, it had a T.M. on the original artwork, and that T.M.
15 should have been removed from that image before we published
16 that to our website.

17 Q. All right. So now we've talked about the Vintage Brand
18 memorabilia, the website, the product pages and the individual
19 product page. What happens next if a consumer clicks add to
20 cart and enters their payment information. Does the consumer
21 receive a payment confirmation, something like that?

22 A. Right. So as soon as you place an offered, you receive
23 an order confirmation. So first you'll see a screen that said
24 your order's been accepted. You'll receive an e-mail in your
25 e-mail box that's from Vintage Brand. That gives you tracking

1 order, tracking information. And then it gives you contact
2 information if you have a problem, how to contact us through
3 e-mail or through chat. And then if you provided your phone
4 number in the process of checking out, we send you a text
5 message as well from Vintage Brand. And then we will send you
6 an additional text message when your order actually ships so
7 that you have the tracking information, and we also send an
8 e-mail with that same tracking information.

9 Q. What's a typical time line between order and delivery of
10 the product for Vintage Brand?

11 A. We create the product within two days and we ship it via
12 US postal service, and from our facility in Nashville,
13 Tennessee, that reaches 99 percent of the country within three
14 days.

15 So if you're in the Midd West or East Coast, you're
16 probably going to get it in one to two. If you're in Seattle
17 or California, it's going to be about three days shipping
18 time.

19 Q. All right. Let's talk a little bit more about how
20 Vintage Brand's products are actually printed and made.

21 The general time frame that we're kind of focused
22 on in this litigation is 2008 to 2021, during that time frame,
23 did Vintage Brand manufacturer and print its own products?

24 A. No, it did not.

25 Q. Who did that?

1 A. Sportswear, Incorporated.

2 Q. Why did Vintage Brand -- well, let me ask you this first.
3 Was that a contractor arrangement? What was the actual nature
4 of that arrangement between he Sportswear and Vintage Brand?

5 A. That was a fulfillment agreement between Sportswear and
6 Vintage Brand.

7 Q. What would be the -- what was included within the scope
8 of services provided by Sportswear within that fulfillment
9 agreement?

10 A. So they would print and fulfill the orders, and they ship
11 those orders to the consumers, and they provided the service
12 on those orders and supplied the tracking information, or if
13 they had a problem with the order and wanted to return it,
14 they would process that.

15 Q. Why did Vintage Brand contract with an outside company,
16 Prep Sportswear, to fulfill orders as opposed to just starting
17 its own manufacturing facility on day one?

18 A. So Vintage Brand was a new company. We were investing
19 all of our resources in finding collectibles, historical
20 images, and then building our new technology on the web to be
21 able to have a website that could handle all of our images,
22 and so our focus was really 100 percent on what we call the
23 front end, meaning the website and getting all of that built
24 out. What we didn't want to do is also try and spend the time
25 finding a location to print, acquiring all the equipment,

1 hiring people, training people, and trying to get the best
2 quality product out there.

3 We felt like our best chance of success was to
4 really focus on the service side with the website, and let
5 somebody who had the quality control in place to really do the
6 manufacturing on the back end. It also reduces the investment
7 risk that you have to make up front. We're already investing
8 millions of dollars on the front end to build this stuff and
9 acquiring collectibles. No sense in going out and building a
10 fulfillment center when we weren't sure if the business would
11 be successful.

12 Q. And does the Vintage Brand at the present continue to
13 contract with Sportswear for fulfillment?

14 A. No, it doesn't.

15 Q. Who prints Vintage Brand's products?

16 A. Vintage Brand prints all of their own products out of a
17 facility in Nashville, Tennessee.

18 Q. How many people are employed at that facility?

19 A. There's 30 people there presently

20 Q. All right. Let's back up again to the period of 2018 to
21 2021 and you talked already about how the application process
22 of printing Vintage Brand's products. Let's talk about where
23 the actual fabric and shirts, things like that come from.

24 Where do -- where did Sportswear get those
25 underlying blanks, like. T-shirts?

1 A. So we've been working for about 14 years with Berkshire
2 Hathaway. That's the ninth largest company in the United
3 States, primarily owned by Warren Buffett. He owes Fruit of
4 the Loom, Russell Athletic, and Jerseys within his Berkshire
5 holdings. They're based out of Bowling Green, Kentucky, so
6 it's only about 120 miles south of our Louisville facility.
7 So we've been working with them very closely for the last 14
8 years to utilize their manufacturing facilities to acquire
9 blanks, meaning, like, a blank white t-shirt or a sweatshirt
10 that we then print on.

11 Q. What quality control measures, if any, did Sportswear
12 employ and implement when it came to printing and
13 manufacturing Vintage Brand's products?

14 A. So the facility in Louisville is quite complex. There's
15 91,000 square feet. We have \$15 million worth of printing
16 equipment in there. We have had as many as 250 employees in
17 there. There's been times in November and December where we
18 are operational 24 hours a day, seven days a week. And so
19 it's really built out with a lot of people in different work
20 stations and workloads.

21 So we have a portion within the facility where
22 there's people that pick product, and what that means is they
23 go around and they pick a blank product that somebody's
24 already ordered, like, say, a white t-shirt, and it flows
25 through the facility. And the next place it hits is what we

1 call QC, and that stands for quality control. And so it's
2 whole -- we have 10 people on that line, and they take those
3 blank products, and all they're doing is looking to make sure
4 that blank product is good. And what I mean by good is
5 sometimes in a warehouse facility, if a white t-shirt is
6 dropped on the floor, it will get a dark mark on it. Or
7 sometimes we'll get a t-shirt that has a hole in it. So
8 they're going through inspecting that garment to make sure
9 that it's good to print on. We don't want to -- we want to
10 get that out before we spend the time and effort and money to
11 print on it. So we're checking that up front. So it's a
12 consumer control, but it's also a cost control for us.

13 Then it goes to the floor and gets printed. After
14 it's printed, it flows up to another quality assurance work
15 flow table where they're actually looking at that printable
16 portion of the product, what we've printed on that product.
17 Is it straight; is it printed in the right location; and
18 making sure that the colors are right and that it's not
19 pilling. And so once they've approved that, then that goes to
20 shipping.

21 So at shipping, that person's job is to scan that
22 tote, that that item's in, and then they get a full visual on
23 their computer screen that they can see. So they're looking
24 at here's what the consumer thinks they've purchased, and
25 here's -- I have the physical item now in front of me. So

1 they're making sure that it looks exactly like that image that
2 the consumer thinks they're going to receive.

3 And if that's all good, then they pack it in our
4 packaging and they ship it out the door.

5 Q. All right. Now let's transition a little bit to talk
6 more about the products that Vintage Brand actually sold --
7 well, actually, hang on. Let me cover a subject that relates
8 to Sportswear.

9 When a consumer makes a purchase on the Vintage
10 Brand website, which company collects the money from the
11 customer?

12 A. That would be Vintage Brand.

13 Q. How would, if at all, is Sportswear compensated for the
14 fulfillment services that it provides Vintage Brand?

15 A. So Vintage Brand would then take those proceeds and send
16 them to Sportswear. Sportswear is manufacturing on Vintage
17 Brand's behalf, and then there's a revenue share back to
18 Vintage Brand.

19 Q. Okay. Now, let's talk about the actual sales that
20 Vintage Brand had on the products decorated with historic Penn
21 State imagery.

22 Can we pull up Plaintiff's Exhibit 29 for the
23 witness, please. And I believe this has been admitted. Okay.
24 This has been admitted, so we'll go ahead and publish it.

25 Do you recognize this, Mr. Hartvigson, and please

1 scroll down. You might recognize the table that appears.

2 There we go.

3 A. Yes, I do.

4 Q. What is this?

5 A. This is a table that we provided during discovery that
6 outlines all of the sales from historical Penn State images.

7 Q. Okay. Is this information that you compiled?

8 A. Yes. I compiled all of this.

9 Q. All right. If we could zoom in a little bit, and I'd
10 like to scroll through this just so the jury gets an
11 understanding of -- let's stay at the top of what products
12 Vintage Brand actually sold related to Penn State.

13 So maybe orient the jury. What do we see here in
14 terms of the image that's in the left table, the left column.

15 A. So in the left, you first see that -- the historical
16 image itself. And then below that, you see that image number
17 that Vintage Brand uses to identify that image.

18 And then the next thing it shows are the dates that
19 that image was offered or sold on the Vintage Brand website.
20 And then we see the gross revenue. So that's the revenue
21 number that consumers paid for those products. And then the
22 next portion is the net profit, so that's the amount of money
23 that was made from that image.

24 Q. Okay. And then the next column, I see total items 356.
25 What does that refer to?

1 A. That's the total number of items that were purchased with
2 this image on it.

3 Q. Okay. And then below that, does that give the blank
4 product type t-shirt, sweatshirt, the total number of blank
5 types that that artwork appeared on?

6 A. Yes. That's a breakdown of category, how many times that
7 image was produced on those different categories.

8 Q. Okay. And if we scroll down, please, Brock. And just
9 for this line -- image, which I understand has been referred
10 to as the S lion logo. You've heard that terminology?

11 A. Yes.

12 Q. How many total items were sold by Vintage Brand bearing
13 that artwork?

14 A. 170.

15 Q. Okay. And if we keep going down. How about this item
16 here. How many total items of this image?

17 A. 228.

18 Q. Okay. And the next one, please. How about for this
19 image?

20 A. 139.

21 Q. Okay. Going down. And for this image?

22 A. 25.

23 Q. Okay. And down, please. For this image?

24 A. 60.

25 Q. Okay. And let me -- the image that we see there that's a

1 Lion's face and I like Penn State, was that one of the buttons
2 that you had to your right?

3 A. Yes, it is.

4 Q. Okay. And scroll down, please. This image here, how
5 many items were sold for that?

6 A. 32.

7 Q. You were present when Ms. Petulla testified; is that
8 right?

9 A. Yes.

10 Q. Do you recall her testifying about a Beaver Stadium
11 puzzle?

12 A. I do.

13 Q. Is that this image here?

14 A. Yes, it is.

15 Q. Okay. If Ms. Petulla had feedback in terms of how the
16 Vintage Brand product description could be modified to suit
17 their concerns, would that be information that Vintage Brand
18 would welcome and consider and potentially implement?

19 A. Yes. We would love that feedback.

20 Q. Okay. Let's go ahead and scroll down a little bit more.
21 How about for this image here?

22 A. 23.

23 Q. Is this the Cotton Bowl or the Cotton Bowl buttons that
24 you have to your right?

25 A. Yes. That he is the Cotton Bowl from 1975.

1 Q. Okay. Scrolling down, please. What image is this?

2 A. This is an image of Beaver Stadium quite a while ago,
3 probably in the 60s. We sold 26 of those items.

4 Q. You say quite a while ago. Does the stadium look a
5 little bit different now?

6 A. Yeah. It looks more like the college you went to.

7 Q. All right. If you scroll down a little bit more, please.
8 How many items for this artwork?

9 A. 25.

10 Q. Okay. Continue, please. And for this artwork?

11 A. Nine.

12 Q. Continue now. For this one?

13 A. Five.

14 Q. Next. This one.

15 A. 26.

16 Q. Next. This one?

17 A. 8.

18 Q. Next. This one?

19 A. 40.

20 Q. Okay. Next one.

21 A. 12.

22 Q. Next one, please. This one?

23 A. 18.

24 Q. I want to pause for a moment on this one. Are you aware
25 of anything unique as it relates to this particular artwork?

1 A. Yeah. This is -- this is a really important image. This
2 is something we specifically looked for and searched for.

3 Q. And, Mr. Hartvigson, can I interrupt you for a second. I
4 think we have a larger version of this image. It's Defense
5 Exhibit 250. Can we bring this down and just for the witness,
6 please.

7 Do you recognize Defense Exhibit 250?

8 A. Yes.

9 Q. What is it?

10 A. This is a football schedule for the 1947 season.

11 Q. Okay. And is this within Vintage Brand -- this is one of
12 the enhanced images that Vintage Brand offered on its website?

13 A. Yes.

14 MR. FETTERS: I'd move to admit --

15 COURTROOM DEPUTY: This is already admitted.

16 MR. FETTERS: Oh, it's already admitted. Publish
17 to the jury, please.

18 BY MR. FETTERS:

19 Q. All right. I interrupted you, Mr. Hartvigson. Please
20 continue. What is the significance, as you understand it, of
21 this image?

22 A. So this both a historic image to Penn State as a
23 university and to this country, as a whole. This Penn State
24 team in 1947, this team is -- there are stories about this
25 team from the start in 1946. And the last game of the season

1 that season, they were headed to the University of Miami to
2 play their last football game. And they were notified the
3 University of Miami was a segregated football team. It means
4 it was only white players.

5 Penn State was notified that they had to leave
6 their black players at home if they were going to come to the
7 University of Miami and play that game. The players
8 collectively decided that they would not go.

9 So then when the next season came around in 1947,
10 that same conversation came up. And one of the players on the
11 team that was an offensive linemen, he stood up and said, We
12 are Penn State, and these conversations are over.

13 Penn State went on to play that season in the
14 Cotton Bowl, and that was the start of desegregation in
15 American sports. And it also was the start and the origin of
16 the We Are Penn State cheer.

17 Q. All right. Thank you, Mr. Hartvigson. If you can go
18 back to Plaintiff's Exhibit 29 where we left off with this
19 image.

20 How many items were sold featuring this artwork?

21 A. 18.

22 MR. FETTERS: Permission to approach?

23 THE COURT: You may.

24 BY MR. FETTERS:

25 Q. I'm showing you what's been marked for identification at

1 Plaintiff's Exhibit 298. Please just look at that to yourself
2 for now. Do you recognize that?

3 A. Yes.

4 Q. What is it?

5 A. It's a canvas of that image.

6 Q. Is that -- is that a Vintage Brand product?

7 A. Yes, it is.

8 MR. FETTERS: Move to admit.

9 MS. WHEATLEY: No objection.

10 THE COURT: Duly admitted.

11 MR. FETTERS: Okay. Move to display to the jury.

12 THE COURT: You may display.

13 BY MR. FETTERS:

14 Q. All right. You can go ahead and display that,
15 Mr. Hartvigson.

16 So that artwork, you only sold 18 products. What
17 kind of products were those that you had sales for?

18 A. We sold two canvas wall arts, one metal wall art, four
19 posters, five magnets, one cutting board, and five puzzles.

20 Q. Okay. 18 sales. How much gross revenue from that
21 artwork?

22 A. \$263.13.

23 Q. That amount of sales and that amount of revenue, do you
24 have -- is that a success for Vintage Brand? Is that a
25 failure? Is that a product failure? What's Vintage Brand's

1 view on that type of sale of revenue?

2 A. So because of the efficiency of the manufacturing process
3 that we put together with the technology we developed, once we
4 have that image, we can make all these things cost
5 effectively. And so we make money off each incremental item
6 that we sell. So our goal is to have a large selection of
7 items for people to purchase. And we're looking to make just
8 a little bit of money off of each one.

9 So from an economic standpoint, you know, we made
10 money. But more importantly, from a historical preservation,
11 we've preserved not only this image, we've preserved this
12 story for other people to tell later in life.

13 Q. All right. And let's just quickly move through the rest
14 of these items. How many sales for that?

15 A. Five.

16 Q. Okay. And down. For this image. How many sales?

17 A. Ten.

18 Q. Next. How many sales?

19 A. Five.

20 Q. Okay. For this image?

21 A. Zero.

22 Q. Okay. And then there's another table down below. We can
23 kind of skip down. And this -- for this -- this image, how
24 many sales?

25 A. Zero.

1 Q. Okay. Next, for this image?

2 A. Zero.

3 Q. Okay. Next, for this image?

4 A. Zero.

5 Q. Okay. Next for this image?

6 A. Zero.

7 Q. Okay. Next?

8 A. Zero.

9 Q. And the next one?

10 A. Two.

11 Q. Okay. And the next one?

12 A. Six.

13 Q. And the next?

14 A. 11.

15 Q. Okay. And anymore? For this image?

16 A. 11.

17 Q. And the next one?

18 A. 12.

19 Q. Okay. The next one. The last one?

20 A. Three.

21 Q. All right. We can take that down. Thank you.

22 THE COURT: Mr. Fetters, I don't want to interrupt
23 the flow of your examination. I assume you have a little more
24 for this witness?

25 MR. FETTERS: Yeah. We're going to talk about

1 product samples, shipping and product samples, and that's the
2 end of this witness.

3 THE COURT: I think we ought to take a short recess
4 at this point. Ladies and gentlemen, we'll stand in recess
5 for about 10 minutes. Court will rise.

6 (At 4:06 p.m., the jury left the courtroom and a
7 recess was held.)

8 (At 4:25 p.m., the jury entered the courtroom.)

9 THE COURT: Back on the record now after our late
10 afternoon recess. Mr. Fetters, you have some additional
11 questions for this witness.

12 MR. FETTERS: Yes, Your Honor.

13 THE COURT: Go right ahead.

14 BY MR. FETTERS:

15 Q. If you could bring up for the witness, the Court, and
16 Counsel, Plaintiff's Exhibit 323, please. Mr. Hartvigson, do
17 you recognize this document?

18 A. Yes.

19 Q. What is it?

20 A. This is a Vintage Brand website, and it's a page
21 featuring historical image of Penn State.

22 Q. And if you could just scroll down for Counsel and the
23 Court's benefit. And if we could go back up.

24 MR. FETTERS: Move to admit Plaintiff's Exhibit
25 323.

1 MS. WHEATLEY: No objection.

2 THE COURT: It will BE admitted.

3 MR. FETTERS: Move to publish.

4 THE COURT: You may publish.

5 BY MR. FETTERS:

6 Q. Mr. Hartvigson, we talked about the T.M. symbol earlier,
7 and I just wanted to go back so the jury could see that. Is
8 this what you were talking about, that T.M. symbol
9 inadvertently retaining on that t-shirt?

10 A. Yes. That's correct.

11 Q. The description that you have there also, what is the
12 date that Vintage Brand has identified for this artwork?

13 A. 1950.

14 Q. How did Vintage Brand go about landing on that date?

15 A. We used our historical data process, referencing
16 different images on the web, as well as looking at the sports
17 logos dot net website, and looking at E-bay dealers that were
18 offering different listings.

19 Q. And were you here when Ms. Esposito testified about this
20 logo, the S lion logo?

21 A. Yes, I was.

22 Q. And does her testimony impact your view at all of the
23 date that's identified here by Vintage Brand?

24 A. Yeah. I think a more correct date is probably 1953 based
25 on some of the knowledge that we learned through her

1 testimony.

2 Q. Okay. If we can go ahead and take that exhibit down.

3 Let's bring up Defense Exhibit 18 for the witness, please. Do
4 you recognize Defense Exhibit 18, Mr. Hartvigson?

5 A. Yes, I do.

6 Q. What is it?

7 A. That is orders, completed orders for Vintage Brand that
8 are wrapped in Vintage Brand-branded wrapping paper.

9 Q. Okay.

10 MR. FETTERS: Defense moves to admit D-18.

11 MS. WHEATLEY: No objection.

12 THE COURT: Duly admitted.

13 MR. FETTERS: Move to publish.

14 THE COURT: You may publish.

15 BY MR. FETTERS:

16 Q. All right. Now that the jury can see this, can you just
17 describe. It looks like there's some wrapping paper around
18 something; is that right?

19 A. Yeah. So at the top you have socks that have been
20 imprinted, and they're in a wrapper. But then below, what
21 Counsel's pointing out is that is an order that has been
22 wrapped in wrapping paper, Vintage Brand-brand wrapping paper.
23 So every order that comes through, we package it in individual
24 bags, and then we wrap it with branded crepe paper before it
25 goes in to a Vintage Brand-branded black bag.

1 Q. Okay. We can go ahead and take that down, please, and
2 bring up for the witness D-20. Do you recognize what this
3 image depicts?

4 A. Yes.

5 Q. What is it?

6 A. That is a box with a Vintage Brand sticker on it. Most
7 likely that has some sort of drinkware contained in it.

8 Q. Okay.

9 MR. FETTERS: Move to admit Defendant's Exhibit 20.

10 MS. WHEATLEY: No objection.

11 THE COURT: Duly admitted.

12 MR. FETTERS: Move to publish.

13 THE COURT: You may publish.

14 BY MR. FETTERS:

15 Q. Now that the jury can see it, is a sticker like that
16 typical for -- to be placed on cardboard boxes when shipping
17 products?

18 A. Yes. We place that on all of the boxes that ship direct
19 to consumer.

20 Q. Okay. We can go ahead and take that down and put up for
21 the witness Defendant's Exhibit 22, please.

22 Do you recognize this photo?

23 A. I do.

24 Q. What is it?

25 A. That's a t-shirt highlighting the neck tag with the

1 Vintage Brand logo name imprinted on it.

2 Q. Okay.

3 MR. FETTERS: Move to admit D-22.

4 THE COURT: Any objection?

5 MS. WHEATLEY: No objection.

6 THE COURT: Duly admitted and you may publish.

7 BY MR. FETTERS:

8 Q. Again, Mr. Hartvigson, is the label that we see here
9 pretty typical of what Vintage Brand imprints on t-shirt
10 products?

11 A. That's correct.

12 Q. And what about Vintage Brand's other products,
13 sweatshirts, any number of products. Does Vintage Brand
14 typically place its name and logo on all products?

15 A. We -- from 2018 to 2021, we placed it on all products.
16 More recently, some of the flees, which means sweatshirts, we
17 have not been placing that -- that tag on the sweatshirts.

18 Q. Is that an alternate tag?

19 A. Yeah. There's an alternate tag. We use a sticker that
20 we put on the front, up here, (indicating) rather than on the
21 label.

22 Q. Okay. We can take that down and please put up for the
23 witness only Defense Exhibit 21. Do you recognize what's
24 depicted in this exhibit?

25 A. Yes. That's a Vintage Brand hat.

1 MR. FETTERS: Move to admit D-21.

2 MS. WHEATLEY: No objection.

3 THE COURT: Duly admitted.

4 MR. FETTERS: Move to publish.

5 THE COURT: You may publish.

6 BY MR. FETTERS:

7 Q. And is this typical in terms of placing a Vintage Brand
8 sticker on hats, Mr. Hartvigson?

9 A. Yes.

10 MR. FETTERS: Okay. We can take that down.

11 BY MR. FETTERS:

12 Q. Now, I'd like to transition to inspecting and just having
13 you show the jury some actual Vintage Brand product samples.

14 The first one that I'll show you has been marked for
15 identification as D-302. Do you recognize that,

16 Mr. Hartvigson?

17 A. Yes.

18 Q. Maybe to speed things along, I might just bring these
19 items up and we'll do them together. All right. Go ahead and
20 take a look at those and just identify each of those objects,
21 what they are, what you recognize them.

22 A. So I have a t-shirt. Do you want hem to hold them up or
23 anything?

24 Q. Not yet. Just identify them.

25 A. A t-shirt, Vintage Brand stainless steel mug. A tumbler,

1 and then coasters.

2 Q. Okay. And I believe those are all marked, and confirm
3 for me if that's correct, Mr. Hartvigson, D-302, D-300, and
4 D-348. Is that what you have?

5 A. Yes.

6 Q. Okay.

7 MR. FETTERS: Move to admit those exhibits.

8 MS. WHEATLEY: No objection.

9 THE COURT: Duly admitted.

10 BY MR. FETTERS:

11 Q. Okay. And if you would just please hold those up to the
12 jury and just briefly describe what they are. You don't need
13 to spend a lot of time on it.

14 A. Okay. This is a stainless steel 8-ounce mug. It's
15 imprinted with an imprint there on the front. This is a
16 coaster that you would set a drink on a table. All four of
17 these are a set. They're all the same. This is a canvas that
18 we can hang on a wall. And this is a long sleeve t-shirt.

19 Q. Okay. And I believe there -- some of the packaging that
20 we saw on the photo there, maybe just hold that up for the
21 jury, as well.

22 A. So this has already been opened, but this is what would
23 be been wrapped around that product. That's crepe paper that
24 we wrap all the products in, branded with Vintage Branded.

25 Q. Mr. Hartvigson, the exhibit number on the coasters,

1 please? Can you read that off?

2 A. 351.

3 Q. Okay. And I'm going to -- oh, let me ask you first. The
4 artwork that appears on those products, was that one of the
5 stickers or decals that we looked at early on with the jury?

6 A. Yes. It's right here.

7 MR. FETTERS: Permission to approach, Your Honor?

8 THE COURT: You may approach.

9 BY MR. FETTERS:

10 Q. Okay, Mr. Hartvigson, I believe I've just handed you
11 what's been marked for identification as 351, 354, and D-349.

12 Is that what you see in front of you?

13 A. That's correct.

14 Q. What are those?

15 A. So we have a stainless steel --

16 Q. Don't show them yet.

17 A. Oh. Stainless steel mug, t-shirt, and a koozie.

18 Q. Okay.

19 MR. FETTERS: Move to admit Exhibits 311, D-354,
20 D-349.

21 MS. WHEATLEY: No objection.

22 THE COURT: Duly admitted.

23 MR. FETTERS: Permission to show the jury?

24 THE COURT: You may publish, show the jury.

25 BY MR. FETTERS:

1 Q. Okay. Mr. Hartvigson, please explain just briefly for
2 the jury's benefit, each of those items.

3 A. So this is a stainless steel mug. As I point out, it's
4 hard to see from there, but there's an embossing here with the
5 Vintage Brand logo, the Vintage Brand's name is embossed into
6 the product.

7 This is a koozie so a can warmer or a can cooler, I
8 guess you'd call it. So you'd put your drink in here. And
9 then this is a t-shirt.

10 Q. Okay. You can put those to the side now, Mr. Hartvigson.
11 Okay. As part of getting ready for this trial, did you also
12 personally purchase Penn State-related products that you
13 understood to be officially licensed by Penn State?

14 A. That's correct.

15 Q. Was one of those companies called Fanatics?

16 A. Yes.

17 Q. Do you have a general understanding of Fanatics before
18 making these purchase?

19 A. Yes. Fanatics has tried to acquire one of my other
20 companies three times.

21 Q. What is your understanding of the general nature of the
22 products that Fanatics offers?

23 A. It's basically put under their tag line, which is
24 officially licensed everything.

25 Q. Okay. And for the witness only, can you put up Defense

1 Exhibit 267, please. And just take a look, and we can scroll
2 down just to orient you to this document.

3 Does Defense Exhibit 267 look familiar to you?

4 A. Yes.

5 Q. What is it?

6 A. That's a receipt for the products that I ordered from
7 Fanatics.

8 Q. Okay.

9 MR. FETTERS: Move to admit Defendant's Exhibit's
10 267.

11 MS. WHEATLEY: No objection.

12 THE COURT: Duly admitted.

13 BY MR. FETTERS:

14 Q. All right. We can just publish that just to show the
15 jury. They see that now, and maybe just scroll down.

16 THE COURT: You may publish.

17 BY MR. FETTERS:

18 Q. It's in black and white. Okay. We can go ahead and take
19 that down, and I'm going to hand you what's been marked as
20 Defendant's Exhibit 269, 270, and 271.

21 Mr. Hartvigson, can you identify what those
22 exhibits are?

23 A. Yes. It's three t-shirts.

24 Q. Do those three t-shirts correspond with the receipt that
25 we looked at a moment ago?

1 A. Yes.

2 MR. FETTERS: Move to admit Defendant's Exhibits
3 269, 270, and 271.

4 MS. WHEATLEY: No objection.

5 THE COURT: Duly admitted.

6 MR. FETTERS: Permission to show the jury, Your
7 Honor.

8 THE COURT: You may display to the jury.

9 BY MR. FETTERS:

10 Q. All right. Mr. Hartvigson, can you just take those
11 products out of the packaging and show them one-by-one to the
12 jury.

13 Can you describe that -- your general description
14 of what that is?

15 A. Yes. This is a Nike t-shirt with the Penn State name on
16 there and the Lion's head.

17 Q. You say it's a Nike t-shirt. How do you know that?

18 A. Because the Nike logo is right on the front of the shirt,
19 and it's also here on the tag.

20 Q. Okay. Is there an officially-licensed hologram sticker
21 on that name tag at all?

22 A. Yes. That's right here. (indicating)

23 Q. Okay. And the next product you have?

24 A. This is another Nike t-shirt with Penn State printed on
25 the front.

1 Q. Okay. This is going to sound obvious, but how do you
2 know it's by Nike?

3 A. Nike's prominently placed on the front, and there's a
4 Nike swoosh right there on the neck tag.

5 Q. And the next product, please?

6 A. And there's a license hologram there. (indicating)

7 Q. And what is that shirt?

8 A. This is another Nike t-shirt, the Nike name and swoosh
9 there on the upper left. And then it says Penn State
10 Football.

11 Q. Okay. Is there an officially-licensed hologram sticker
12 on that product?

13 A. Yes, there is.

14 Q. Okay.

15 A. And there's a Nike tag, as well.

16 Q. Okay. I think this product may also have corresponded
17 with that receipt.

18 MR. FETTERS: Permission to approach, Your Honor?

19 THE COURT: You may approach.

20 BY MR. FETTERS:

21 Q. Do you recognize that product, as well?

22 A. Yes, I do.

23 Q. Does that correspond with the purchase receipt we looked
24 at earlier?

25 A. Yes, it does.

1 MR. FETTERS: Move to admit Defendant's Exhibit
2 273.

3 THE COURT: Any objection?

4 MS. WHEATLEY: No objection.

5 THE COURT: Duly admitted.

6 MR. FETTERS: Permission to show to the jury?

7 THE COURT: You may display to the jury.

8 BY MR. FETTERS:

9 Q. Mr. Hartvigson, can you please show that to the jury and
10 describe, generally, what that is?

11 A. So this is a Champion t-shirt with Penn State Football
12 and the Lion's head printed on it.

13 Q. How do you know it's by Champion?

14 A. Their logo is on the neck tag.

15 Q. Okay. Is there officially-licensed --

16 A. And their logo also appears on the sleeve. (indicating)

17 Q. Is there an officially-licensed sticker on that product?

18 A. There is an officially-licensed hologram and a tag
19 telling you it's Champion's product.

20 Q. Okay. All right. You can put those to the side,
21 Mr. Hartvigson. All right. Let's put up for the witness only
22 Defendant's Exhibit 277. And so the Counsel and the Court can
23 see that, just scroll down for a bit for Mr. Hartvigson's
24 benefit. Go back up.

25 Mr. Hartvigson, do you recognize Defense Exhibit

1 277?

2 A. I do.

3 Q. What is it?

4 A. That's a receipt from Nittany Outlet, products that I
5 ordered.

6 Q. What's your understanding of what the Nittany Outlet is?

7 A. I believe that's one of the retail store fronts here in
8 college -- near the college, and -- and they also sell online,
9 in the E-commerce site.

10 Q. Do you have an understanding of whether the Nittany
11 Outlet sells officially-licensed Penn State products?

12 A. Yes, they do.

13 MR. FETTERS: Move to admit Defense Exhibit 277.

14 MS. WHEATLEY: Could you just scroll down to the
15 second page? Sorry. Could you just scroll down to the
16 bottom? Okay. No objection.

17 THE COURT: Duly admitted.

18 MR. FETTERS: Move to publish.

19 THE COURT: You may publish.

20 BY MR. FETTERS:

21 Q. Again, Mr. Hartvigson, is this the receipt for the
22 Nittany Outlet purchases that you made?

23 A. Yes, it is.

24 Q. What's your characterization of the price comparison in
25 your view of these products from Nittany Outlet versus the

1 Fanatics products?

2 A. So the t-shirts here are being sold at 14.99, very low
3 entry level price point, and the t-shirts that I just showed
4 you from Fanatics are selling more in the 34.99 to 39.99
5 range.

6 MR. FETTERS: You can take that down. Permission
7 to approach, Your Honor.

8 THE COURT: You may approach.

9 BY MR. FETTERS:

10 Q. Mr. Hartvigson, I'm handing you these exhibits. If you
11 could just read the exhibit numbers for the benefit of the
12 Court.

13 A. D-278, D-279, D-283.

14 Q. And do you recognize those exhibits?

15 A. Yes.

16 Q. Do they correspond to the receipt that we just looked at?

17 A. Yes, they do.

18 Q. Okay.

19 MR. FETTERS: Move to admit.

20 MS. WHEATLEY: No objection.

21 THE COURT: Duly admitted.

22 MR. FETTERS: Permission to show to the jury.

23 THE COURT: You may display to the jury.

24 BY MR. FETTERS:

25 Q. Mr. Hartvigson, can you show the jury each of those

1 products?

2 A. So it's a t-shirt that as Penn State on the front, and it
3 has the seal.

4 Q. Do you know who made that shirt?

5 A. Yes. This is made by New Agenda on a Gildan t-shirt.

6 Q. Are you familiar with Gulden?

7 A. Yes.

8 Q. What is Gulden?

9 A. Gulden is a Canadian company. They're the largest
10 t-shirt manufacturing company in the world.

11 Q. And the next item that you have there?

12 A. This is another Gulden t-shirt with Penn State printed on
13 it and the Lions head.

14 Q. Okay. And the next one?

15 A. This is a Nike t-shirt, and this also has the Lion's
16 head.

17 Q. Is there -- amongst the products that you've handled up
18 there that you understand to be from officially-licensed Penn
19 State retailers, have you noticed any difference in terms of
20 the look and feel of the product -- you know, the touch and
21 feel of the product?

22 A. No. There was one product that was more of a
23 moisture-wicking fabric. The rest of them are all pretty much
24 the same.

25 Q. Let's go ahead and take a look at Defendant's Exhibit 281

1 just for the witness. Do you recognize Defendant's Exhibit
2 281?

3 A. Yes, I do.

4 Q. What is it?

5 A. That's a receipt from the Family Clothesline that I
6 purchased apparel.

7 Q. Okay. And just scroll down for the benefit of Court and
8 Counsel.

9 MR. FETTERS: Move to admit Defendant's Exhibit
10 281.

11 MS. WHEATLEY: No objection.

12 THE COURT: Duly admitted.

13 MR. FETTERS: Move to publish.

14 THE COURT: You may publish.

15 BY MR. FETTERS:

16 Q. Again, Mr. Hartvigson, can you explain what that this is?

17 A. This is a sheet showing the three items that I purchased.

18 Q. Okay. And what's your characterization of the price
19 points for these products in relation to the other ones that
20 we've looked at?

21 A. So this is Nike and Under Armor products, and you're
22 paying 34 to \$35 for the same t-shirts Gulden is selling at
23 \$14.99.

24 A.

25 MS. WHEATLEY: Objection. 602. Foundation.

1 MR. FETTERS: He just had the receipt up for the
2 last -- the last set of products.

3 MS. WHEATLEY: What is his foundation for saying
4 it's the same t-shirt?

5 MR. FETTERS: The Gulden. Gulden. Same underlying
6 like products.

7 MS. WHEATLEY: But he has no foundation for saying
8 it's the exact same t-shirt.

9 MR. FETTERS: Sounds to me like an item for cross
10 examination, not an evidentiary ruling.

11 MS. WHEATLEY: Well, he has no foundation to make
12 that statement.

13 THE COURT: What's the foundation?

14 MR. FETTERS: That he understands that the product
15 manufacturer of the blank is Gulden across the board. And I
16 believe that's what he's testifying to.

17 MS. WHEATLEY: Mr. Hartvigson has laid no
18 foundation for his understanding of this third party company.

19 THE COURT: Can you flesh this out a bit?

20 MR. FETTERS: Yes.

21 THE COURT: Objection sustained. Go ahead.

22 BY MR. FETTERS:

23 Q. Mr. Hartvigson, I think you testified previously that
24 you're aware of a company called Gildan; is that right?

25 A. That's correct.

1 Q. How did you become aware of the company called Gildan?

2 A. I've been in the sports apparel industry for nearly 30
3 years. Gildan is the largest manufacturer of t-shirts in the
4 world. We've purchased products from Gildan over the course
5 of time.

6 Q. Okay. And have you had occasion to handle, touch, and
7 feel products manufactured by Gildan?

8 A. Yes.

9 Q. How many times?

10 A. Thousands.

11 Q. All right. What -- can you repeat what you said? What's
12 your impression of the touch and feel of the product quality
13 of the products that you have had up in front of you?

14 A. They're very, very similar, if not the same.

15 Q. Okay.

16 MR. FETTERS: Permission to approach, Your Honor?

17 THE COURT: You may approach.

18 BY MR. FETTERS:

19 Q. I'm approaching the witness with what's been marked as
20 Defendant's Exhibit 284. Do you recognize this?

21 A. Yes.

22 Q. What is it?

23 A. This is the order that I placed with the Family
24 Clothesline.

25 Q. Does that correspond with the receipt that we looked at?

1 A. Yes, it does.

2 MR. FETTERS: Move to admit.

3 MS. WHEATLEY: No objection.

4 THE COURT: Duly admitted.

5 MR. FETTERS: Permission to show to the jury.

6 THE COURT: You my display to the jury.

7 BY MR. FETTERS:

8 Q. Mr. Hartvigson, first, can you pull -- well, let's take a
9 look at the box itself. Does that identify where the -- the
10 box that it came from, Family Clothesline?

11 A. Yes. It came from Family Clothesline. It's right on the
12 box.

13 Q. And then the bag, did that come within the box?

14 A. Yes. It's in another Family Clothesline bag.

15 Q. Okay. And then go ahead. The t-shirt itself. What kind
16 of t-shirt is that?

17 A. This is an Under Armor t-shirt. You can tell by the
18 Under Armor logo on the front. And then it says Penn State.
19 You also have an Under Armor tag inside the neck. Also on the
20 back of the neck. And also on the tag. And then you have a
21 licensed hologram on there, as well.

22 Q. Okay. You can put that to the side. We just have a few
23 more topics to cover, which I don't think will take very long.

24 Let me ask about Vintage Brand's advertising and
25 marketing. Does Vintage Brand engage in any advertising or

1 marketing.

2 A. Can you repeat that question?

3 Q. Yeah. Vintage Brand, in terms of advertising or
4 marketing, like t.v. commercials, things like that, does
5 Vintage Brand engage in that?

6 A. No.

7 Q. Does Vintage Brand utilize Google marketing?

8 A. Yes.

9 Q. Google ads?

10 A. Yes. Yes.

11 Q. How does that work? What's the nature of Vintage Brand's
12 -- the services that Vintage Brand acquires through Google
13 ads?

14 A. Yeah. We use a program called Dynamic Search Ads, where
15 we provide Google with a budget each month. And then they
16 send our ads out across their network to prospective people
17 that are doing searches on Google.

18 Q. Does that involve key words of any sort?

19 A. No. We don't do any key word campaigns.

20 Q. You know I just realized -- this is my neglect. I should
21 have seen these here.

22 MR. FETTERS: Permission to approach, Your Honor.

23 THE COURT: You may approach.

24 BY MR. FETTERS:

25 Q. I'm handing you what's been marked as Defendant's Exhibit

1 367. Mr. Hartvigson, do you recognize that?

2 A. Yes, I do.

3 Q. What is it?

4 A. This is a Hanes t-shirt with Penn State printed on it,
5 and the Lion's head. The Hanes tag is here, and the hologram
6 officially-licensed is on the back.

7 Q. Did you -- we need to move to admit that. Did you -- how
8 did you come to acquire that t-shirt?

9 A. I purchased that here in Williamsport when I arrived on
10 Monday evening across the street at Wegman's.

11 Q. Okay.

12 MR. FETTERS: Move to admit -- can you say the
13 exhibit number?

14 THE WITNESS: D-367.

15 MR. FETTERS: Move to admit D-367.

16 MS. WHEATLEY: No objection

17 THE COURT: Duly admitted.

18 BY MR. FETTERS:

19 Q. All right. I want to ask you first about -- I believe we
20 talked about marketing. I wanted to ask you about did Vintage
21 Brand do any promotional trips to different sports stadiums in
22 the early days of its founding?

23 A. Yes, we did.

24 Q. Can you tell the jury about what the nature of that was?

25 A. We visited some college football facilities on their

1 college football game days, and we handed out Vintage
2 Brand-branded koozies for free to fans during their tailgating
3 activities.

4 Q. Okay. Did you have a trip out here to State College to
5 do that at Beaver Stadium?

6 A. We did. We visited Beaver Stadium on September of 2019.

7 Q. Why did you go to Beaver Stadium as opposed to any other
8 stadium?

9 A. We went to a few stadiums, but we chose Beaver Stadium
10 nine months in advance. We felt -- there was a game in
11 September that we were very interested in. Penn State was
12 playing Ohio State, and we thought that might be the college
13 Game Day of the week game. It ends up it was. Both teams
14 were undefeated. Penn State was ranked ninth. Ohio State was
15 ranked fourth. And we came out here to that game. We knew it
16 would be a fun environment and a good place to promote Vintage
17 Brand.

18 Q. And when you were at Beaver stadium, were you wearing
19 Vintage Brand apparel?

20 A. Yeah. So we were wearing black Vintage Brand t-shirts,
21 so Vintage Brand printed on the front, black Vintage Brand
22 hats with Vintage Brand printed across the front, and we had
23 on black wristbands that said Vintage Brand.

24 Q. The jury has seen, in the context of the expert survey
25 screenshots and actual product mockup with Vintage Brand on

1 the chest on the Vintage Brand website. Does that -- does
2 Vintage Brand actually have that on its website?

3 A. Yes.

4 Q. Why?

5 A. That's a very easy way for us to promote the brand, very
6 cheap and effective. We view it as a wearable business card.

7 Q. Just to wrap up, Mr. Hartvigson, this case is about
8 whether consumers are being misled in to thinking that Penn
9 State is responsible for the quality of Vintage Brand's
10 products. So I'm just going to ask you that straight
11 question.

12 From your perspective, is Vintage Brand trying to
13 trick consumers in to believing that Penn State is responsible
14 for the quality of Vintage Brand's products?

15 A. No. I believe we make it very clear on the Vintage Brand
16 website that all the products are provided by Vintage Brand.
17 No products are made by Penn State. No products are
18 affiliated with Penn State. No products are sponsored by Penn
19 State. And Penn State is definitely not held accountable for
20 the quality of the products. Vintage Brand is held to the
21 quality of the products.

22 MR. FETTERS: No further questions.

23 THE COURT: Thank you. Counsel, would you come to
24 sidebar for a moment, please.

25 (The following discussion occurred at sidebar.)

1 THE COURT: That took longer than I anticipated,
2 but that's fine. I assume it will be best to get in to cross
3 examination Monday morning because you're going to have a bit
4 of cross examination for this witness. Ms. Wheatley, you're
5 going to examine, correct?

6 MS. WHEATLEY: Yes.

7 THE COURT: You're -- how much time are you going
8 to have? An hour-and-a-half.

9 MR. FINKELSON: We had estimated that we may have
10 need an hour and 45 when Mrs. Rhinehart asked us. But we will
11 try to cut it down over the weekend. And we would ask that
12 the witness be sequestered over the weekend.

13 THE COURT: Yes. I'll speak to him about that. So
14 that's fine.

15 MR. FINKELSON: We did have a couple of issues to
16 raise arising from the testimony.

17 THE COURT: Do you want to address that outside of
18 the presence of the jury?

19 MR. FINKELSON: Happy to.

20 THE COURT: Why don't we do that --

21 MR. FINKELSON: One relates to a limiting
22 instruction we're going to request in view of the copyright
23 related testimony that the witness gave. But --

24 THE COURT: All right.

25 MR. FINKELSON: It's certainly fine for the jury to

1 be instructed on that on Monday.

2 THE COURT: Understood. So let's discuss that
3 momentarily. All right. I'll excuse them for the day then.
4 Hang on a minute. Thank you.

5 (The discussion at sidebar was concluded.)

6 THE COURT: All right. Ladies and gentlemen, I've
7 spoken to Counsel. Obviously there's going to be a bit of
8 cross examination for Mr. Hartvigson, as you'd expect. So I
9 think it's best that we recess out for the day.

10 Again, there has been some media coverage of this
11 case. Do not read or listen to any articles or discussion of
12 this case either in print, any website you should go to or
13 blog, I suppose if there's any blog, any radio or television
14 program. Don't discuss the matter amongst yourselves.

15 We're going to recess until next Monday, which is
16 November 18. Again, if you could be back in the courthouse by
17 about 9:15. That day, we'll resume testimony from
18 Mr. Hartvigson by way of cross examination. And then I think
19 the defense had their expert, would has been referenced,
20 Dr. Erdem, and then I think we'll be probably moving toward
21 the close of the Defendant's case on Monday, at least as the
22 attorneys have charted that out for me at this juncture.

23 So I wish you a pleasant weekend. Save travels.
24 Mrs. Rhinehart, if you'll escort the jury out, please.

25 (At 5:00 p.m., the jury left the courtroom and were

1 excused for the weekend.)

2 THE COURT: Mr. Hartvigson, I invite you back to
3 Counsel table.

4 All right, so you -- somebody had a question,
5 Ms. Wheatley, or you need some instruction from me or --

6 MS. WHEATLEY: Yes, Your Honor. Two issues. The
7 first issue, the witness did mention copyright a number of
8 times in regards to the criteria he applied to the images on
9 his website. We understood that to be within Your Honor's
10 order. Your Honor did invite us to cross-examine the witness
11 vigorously on whether copyright can be a defense to trademark
12 law.

13 The issue in why we are requesting a limiting
14 instruction is that we know from Mr. Hartvigson's deposition
15 that he said very clearly his entire belief about trademark
16 law, his entire knowledge of trademark law came from advice of
17 Counsel, which of course is a door we cannot open. They did
18 not assert that defense, and I certainly don't want to cross
19 examine on hearsay and the law, and the jury will have no way
20 to evaluate who is frankly right on the law between
21 Mr. Hartvigson and Mr. Myself having received no instructions
22 as to the law.

23 So our request would be a limiting instruction from
24 Your Honor that closely parallels that -- the comment in your
25 opinion as to the fact that copyright law was -- public domain

1 does not protect the Defendant's conduct here. And then my
2 cross examination could be on that instruction, to the extent
3 I need to cross examine at all.

4 THE COURT: So you'd like me to open court, then,
5 Monday with that -- that instruction as it were, a limiting
6 instruction to the jury.

7 MS. WHEATLEY: Yes, Your Honor.

8 THE COURT: All right. Who is going examine --
9 well, Mr. Fetters, I guess that's really a question for you.
10 So any objection to that?

11 MR. FETTERS: Well, I guess I would object to -- I
12 think that the witness said that all he did was look to see if
13 there's a C symbol and to remove that. He didn't say that if
14 it did have that, it was entitled to certain right or that
15 Vintage Brand was entitled to certain protections. He didn't
16 say that he understood what the legal significance of that to
17 be. I think lay jurors understand, just generally, that C's
18 with circles exist in the world. And so all he said was that
19 he looks for that, and he removes it. He didn't make any
20 conclusion as to what significance that is.

21 THE COURT: I think -- I think this doesn't amount
22 to a greet deal. But I think a limited instruction -- sort of
23 a limited limiting instruction. I'll craft that consistent
24 with my recent ruling of -- well, whenever it was, ten days
25 ago. And if you'd like me to begin the discussion, just -- if

1 you'd remind me of that, Ms. Wheatley, and I will give them --
2 provide that limiting instruction before you begin your cross
3 examination of Mr. Hartvigson.

4 Anything else?

5 MS. WHEATLEY: Thank you, Your Honor.

6 THE COURT: Mr. Feters, I'll hear from you in just
7 a moment. Ms. Wheatley, go ahead.

8 MS. WHEATLEY: The other issue was there was
9 extensive testimony during direct regarding other -- there was
10 extensive testimony during the direct examination regarding
11 other schools that both Prep Sportswear and Vintage Brand sold
12 products from, Vintage Brand, there were images shown of those
13 school's products. For Prep Sportswear, there was discussion
14 of the many, many high schools he has sold for. And in our
15 opinion, this very much opened the door to some limited cross
16 examination as to the fact that many, many of those schools
17 have issued cease and desist letters. Many, of those school
18 have, in fact, sued Mr. Hartvigson and are not at all happy
19 that those logos are shown on those sites.

20 Without allowing that to happen, the conclusion is
21 inescapable that Penn State is apparently the only one that
22 thinks that this is unlawful, and that the conduct shown on
23 this website is typical and standard. They did not have to
24 show or discuss that, but they did, and we think that the door
25 has been opened to show that Mr. Hartvigson has been asked to

1 stop repeatedly and has been sued repeatedly.

2 We would not get into the results of any lawsuit.

3 We would simply limit it to establishing that he is doing this
4 against the wishes of many of the schools whose products were
5 shown in the Defendants' exhibits.

6 MR. FETTERS: Your Honor, the fact that Vintage
7 Brand has product offers related to other university and pro
8 teams is not some new piece of information that the jury heard
9 about for the first time. I said it in my opening statement
10 and slides -- in slides that were in my opening statement that
11 Penn State did not object to, did not object to during my
12 opening statement.

13 So even if this were a valid evidentiary argument,
14 it was waived.

15 But it's not a valid evidentiary argument. There
16 is no unfair suggestion that because Vintage Brand or
17 Sportswear, an entirely different website, offered products
18 related to other schools, that that somehow opens the door to
19 other -- other cease and desist letters and other lawsuits.
20 It simply does not equate to that.

21 We did not suggest or assert that Penn State is the
22 only one that is doing this by saying that. It was a
23 discussion of what the business model is, and what's available
24 on the Vintage Brand website, that frankly, both sides have
25 been talking about up until this point. It's just simply not

1 a new issue.

2 So there -- if there is an issue from an
3 evidentiary perspective, it has been waived. And -- but I
4 don't think it's an evidentiary issue to begin with that would
5 open the door to other cease and desist letters and other
6 lawsuits. And of course if we do that, it's going to be a
7 mini trial within a mini trial on each of those, a discussion
8 of differences in circuit law for each of those different
9 matters, and this case will be prolonged.

10 THE COURT: We're not going to do that.

11 So are you telling me you're going to go through
12 each of these schools and examine them? I'm not going to let
13 that happen. We'll be here until Thursday, and that's --
14 that's not the Matthew Brann approach to trial, if you haven't
15 figured that out already. I advise you of that now. We move
16 right along to the best of -- with my level of impatience,
17 which is masked, you know, as you can tell with a certain
18 amount of humor, but I'm impatient. And you know what? These
19 are just ordinary people. So you've got to cut to the chase.
20 Get it out and move on to the next thing. Trust me on this.
21 I know.

22 And do you know how I know. I talk to the jurors
23 afterward. And I've had -- I mean -- how many trials have I
24 had this year, Janel? Seven? Eight? Something like that. I
25 mean this is not my first rodeo. I'm just passing that along

1 to you. Maybe that was sort of lost on me as a practicing
2 attorney. Believe me, it's not as a judge. I'm helping you
3 out. You just don't think so. Well, everybody. I'm helping
4 everybody out.

5 So I -- this is a closed question. The question
6 itself -- I want to take it under advisement; I want to think
7 about that this weekend; I'll give you a ruling on that Monday
8 morning. But to the extent I allow it, you can't go through,
9 well now, what about Bowling Green State University. Geez, I
10 mean, we'll be here until next St. Swithin's Day in that case.

11 I mean broadly-speaking, yes, if I permit it at
12 all. I haven't decide if I would.

13 MS. WHEATLEY: Your Honor, I can give you a preview
14 of exactly what I would ask.

15 THE COURT: Good.

16 MS. WHEATLEY: I would point to the exhibit that
17 was shown and say this school has filed a lawsuit against you
18 trying to get you to stop, correct? Done. This one. And use
19 this page.

20 THE COURT: Which -- which page is it?

21 MS. WHEATLEY: Plaintiff's Exhibit 263.

22 THE COURT: Yes. Hand that up. How many -- how
23 many schools are listed? I didn't even -- it's hard for me to
24 see that exhibit.

25 MS. WHEATLEY: There are seven.

1 MR. FETTERS: Your Honor, can I add two points?
2 One, again, that exact image was in my opening statement,
3 which was give to Plaintiff's Counsel, not objected to.

4 THE COURT: Noted.

5 MR. FETTERS: Number two, part of the likelihood of
6 confusion analysis in this case is the marketplace context on
7 the Vintage Brand website. And one of the arguments that
8 we've made consistently is that because, amongst other things,
9 Vintage Brand offers historic memorabilia artwork related to
10 numerous teams, that that is one of the factors that we think
11 leads consumers to not be confused.

12 So to say that that piece of our likelihood of
13 confusion evidence opens the door to other cease and desist
14 and other lawsuits, we would object to that.

15 THE COURT: No. Understood.

16 MS. WHEATLEY: And, Your Honor, but I think
17 Mr. Fetters just established the factual nexus that you were
18 looking for before you would allow any evidence of this type
19 in and saying this is the exact same thing he does they do
20 with Penn State. And so that's all we would establish, and --

21 THE COURT: I got it. I got it. I've got to think
22 that over. That's -- that's, as I said, in my view, a close
23 question. All right.

24 There's something else, Ms. Wheatley?

25 MR. FINKELSON: We would just ask, as we did at

1 sidebar, that Mr. Hartvigson be sequestered.

2 THE COURT: I'm going to give that instruction.

3 Mr. Feters, you had something?

4 MR. FETTERS: Yeah, it was just a dove tail on the
5 instruction for Monday. We would just request permission to
6 hear it before its given and an opportunity to make a record,
7 if necessary.

8 THE COURT: That's fine. We'll take it up. Just
9 -- I'll remember that, I think, but if I don't, just say to
10 Mr. Kempen, if he's out here or Mrs. Rhinehart that you want
11 to speak to me first. We'll get that sorted out and we'll
12 make a record of that, to the extent that we need to. And I
13 will give you -- I will also give you the ruling in camera or
14 outside the presence of the jury on this -- on this other
15 issue, without explaining further. What else?

16 MR. FETTERS: That's it, Your Honor.

17 MS. WHEATLEY: Nothing further from us.

18 THE COURT: All right. Again I have taken under
19 advisement the Motion for reconsideration. I know,
20 Mr. McKenna, you're working on briefing for that.

21 MR. MCKENNA: That's right.

22 THE COURT: What's that?

23 MR. MCKENNA: I said that's right.

24 THE COURT: Okay. And to the extent that you -- do
25 you have a sense of -- I'm not pushing. I'm just asking --

1 when do you think you're going to have that to me?

2 MR. MCKENNA: Your Honor, I think this morning you
3 said certainly you'd like it before the close of our case, and
4 I would think we'll certainly aim to do that.

5 THE COURT: Yeah. So we'll assume that that's
6 going to come in at some point on Monday. And to the extent
7 that when you get it, if you think you need to reply -- yet
8 you really don't. Remember, while it's true, that when I'm
9 reviewing matters -- judges do it different ways -- I tend to
10 read back to front. It's kind of a curious thing. So I'll
11 actually read the reply briefs and then I read the briefs in
12 opposition and then I read the brief in the support of the
13 underlying motion. Let's say I have a Plaintiff's Motion for
14 summary judgment. That's my style. Some judges do it that
15 way. That sort of makes sense to me to do it.

16 I have almost never read a reply brief that amounts
17 to anything.

18 MR. FINKELSON: Let this be the first, Your Honor.

19 THE COURT: Well, I knew there would be a Finkelson
20 response to that. But I am telling you, I have never -- I
21 don't think I've ever read a reply brief that you've labored
22 over and the clients have paid God's knows how much money for,
23 that really amounts to anything. It just doesn't move the
24 needle. You know, the precompisition does, the underlying,
25 you know -- it's good briefing and your briefing is good. I

1 appreciate that. But I wouldn't get energized about the reply
2 and having to worry about writing that because I want to make
3 a ruling on it, and I think I can, independently of this, I
4 think independently.

5 I've already done some research on this because
6 it's a nuance question. And, you know, there's a question
7 about the manufacturing of it, all right, which is what my
8 ruling is on. There is also an end of it that deals with
9 shipping. You might want to pay to some shipping-related
10 issues. See where we're going with this? I don't know that
11 I've decided that. But there's -- it's a very nuanced
12 question. So with regard to the manufacturing, I'm
13 comfortable with my ruling with regard to the shipping
14 component. It may be another matter worth taking under -- you
15 know, I remind you that there is no such thing for a Motion
16 for reconsideration in the Federal Rules of Civil Procedure.

17 Did you know that? Did A.E. Dick Howard tell you
18 that in Virginia? Well, if he didn't, I'm telling you that
19 now. It doesn't exist, and yet, it's -- there are Motions for
20 reconsideration constantly. I will reconsider, if I need to
21 reconsider. I'm not above that, of course.

22 Now, anything else? All right. So you know where
23 we're going to go. Monday morning, we'll come in; we'll make
24 those rulings. We'll get you oriented. We'll get
25 Mr. Hartvigson sorted around in terms of cross examination.

1 Mr. Hartvigson, this is going to be hard sort of
2 for you to do, probably. But you've got to be, unfortunately,
3 sequestered, you know, at this point from conversation with
4 your Counsel because you -- you know, we've taken a recess,
5 but you're really -- you're still are under oath and I've got
6 to take up cross examination. It's not an ideal circumstance,
7 but it does happen.

8 So I just -- I give you -- I admonish you on that
9 point. And to the extent Mr. McKenna and Mr. Feters will
10 speak to you about that and explain to you what that means in
11 greater detail. I'm sorry to put that burden on you, but
12 that's just the way we recessed out today.

13 The last thing I would say to you, and this is up
14 to you; this is not a directive; you can do what you want.
15 But, you know, if you haven't -- I know what you've been doing
16 probably. I hate to think that you've been going over to
17 Wegman's to get those overpriced -- we're off the record.

18 (At 5:14 p.m., the proceedings were adjourned.)
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